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Supreme Court of the United States

OCTOBER TERM, 1966

No. 48

HERBERT HEIDER, ADMINISTRATOR, ETC.,
PETITIONER,

vs.

MICHIGAN SUGAR CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI FILED JANUARY 3, 1966
CERTIORARI GRANTED FEBRUARY 21, 1966

SUPREME COURT OF THE UNITED STATES

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[fol. A]

IN THE SUPREME COURT OF MICHIGAN

Appeal from the Circuit Court for the County of Saginaw

Honorable Eugene Snow Huff, Circuit Judge

Law No. 26686 (1)

DONALD HEIDER, Administrator for the Estate of James D. Heider, Deceased, Plaintiff and Appellee,

v.

MICHIGAN SUGAR COMPANY, a Michigan Corporation, Defendant and Appellant.

Law No. 26687 (3)

DONALD HEIDER, Administrator for the Estate of David Heider, Deceased, Plaintiff and Appellee,

v.

MICHIGAN SUGAR COMPANY, a Michigan Corporation, Defendant and Appellant.

Joint Appendix

[fol. 4]

IN THE CIRCUIT COURT OF SAGINAW COUNTY, MICHIGAN

No. 26686

DONALD HEIDER, Adm. JAMES HEIDER,

—v.—

MICH. SUGAR CO.

AMENDED DECLARATION—Filed October 25, 1960

Now comes Donald Heider, Administrator of the Estate of James Donald Heider, by his attorney, Gregory M. Pillon, and states:

1. That on or about November 12, 1959, he was duly appointed Administrator of the Estate of James Donald Heider, by the Probate Court for Huron County, and was duly authorized by said Court to institute this action for wrongful death.

2. That the defendant, Michigan Sugar Co. is a Michigan corporation, duly domiciled in Saginaw County.

3. That the defendant, Michigan Sugar Co., operates sugar beet plants and maintains a sugar plant at Sebewaing, Michigan.

4. That the defendant knew that persons came onto their land where their artificial storage ponds are located, to hunt.

5. That the defendant knew persons came on their land where their artificial storage ponds are located, to trap for muskrats, mink, etc.

6. That the defendant knew persons in general, from time to time came unto their land where their artificial storage ponds are located for purposes other than hunting or fishing.

7. That the defendant in the exercise of ordinary care should have known that persons came unto their land where their artificial storage ponds are located.

8. That in the operation of this plant, the defendant Company maintains acres of large, open dangerous, un-
[fol. 5] natural chemical ponds used to dispose of waste material.

9. That this by-product appears in a watery form, but contains dangerous chemicals harmful to human life.

10. That the chemicals are inherently dangerous, making it impossible for anyone to swim therein, and therefore constitutes a trap.

11. That the chemicals form a top surface of a snow like appearance in many places, and during the winter months, it is impossible to tell by sight, which is truly snow or ice, and which is truly chemical.

12. That the defendant knew that their waste products formed on the surface of water, a foamy like substance.

13. That this foamy like substance has the appearance of snow or whipped ice.

14. That the defendant in the course of its business should have known that their waste products formed on the surface of the waste liquid, a foamy like substance that has the appearance of snow or ice.

15. That the defendant knew that in cold weather, their ponds froze, except around immediate areas where their chemical waste products came into the ponds.

16. That the defendant in the course of ordinary care should have known that part of the pond areas froze and that part of it didn't.

17. That the defendant in the course of ordinary care should have known that persons walking on the frozen portion of the ponds would be misled by the foamy substance and believe the entire pond frozen, and could drown.

[fol. 6] 18. That the defendant knew that it would be difficult to distinguish the foamy appearance of part of their pond area from the rest of the pond area and that somebody could drown as a result thereof.

19. That the defendant knew or should have known that somebody could be misled or entrapped by the dangerous and deceptive conditions they maintained.

20. That the defendant could for-see that if somebody walked on the frozen part of their ponds, that person could be entrapped or misled to their death by the maintenance of the ponds in the conditions they were kept without adequate warning or protection and especially so with a child.

21. That the defendant failed to have any warning signs and failed to maintain the property to protect children.

22. That James Heider and David Heider were on the defendant's premises with its implied consent.

23. That James Heider and David Heider were on the defendant's premises with its consent.

24. That James and David Heider were licensees on the defendant's premises.

25. That James and David Heider were invitees on the defendant's premises.

26. That the defendant violated Section 28, 761 M. S. A. being C. L. of 1948, Section 750.493 and Section 28.761, M. S. A. being Act 102 of the Public Acts of 1952 and as a direct violation thereof, David and James Heider drowned, the same being incorporated herein by reference thereto.

[fol. 7] 27. That James Heider is the minor son of the plaintiff, Donald Heider, and on the 21st day of December, 1958, said son with his brother, David and their dog set out muskrat trapping.

28. That James Heider with his brother, and dog entered the defendants premises, and walked onto one of the defendant chemical ponds.

29. That at the time and place, to wit, December 21, 1958, it was approximately 12 degrees below zero.

30. That after walking on said chemical pond, on solid ice, they came to an area where the defendant company,

pumped hot snow like substance into the pond, and thus, James Heider, his brother, David and their dog were misled by the snow like hot chemical and stepped off the ice into the chemical, and after a short struggle, James Heider, his brother David and their dog all drowned.

31. That the overflow pipe, or pipe out of which the chemicals flowed into the pond was hidden in weeds and thicket which the defendant knew or should have known.

32. That the level of the contents of the chemicals in the pond came up to the level of the pipe and with the soapy like substance, concealed the pipe from view which the defendant knew or should have known.

33. That the water and chemicals flowing into the pond did not freeze at or near this pipe, although the rest of the pond was frozen solid and the defendant knew this or should have known this.

34. That James Heider, David Heider and the dog could all swim, but because of the dangerous chemicals, the heat and the snow like substance, they were entrapped and drowned.

[fol. 8] 35. That even though the defendant knew that it maintained ponds there were frozen and knew that at and near the areas of inflow into the ponds, the ponds did not freeze, it posted no warning of any kind.

36. That the defendant Company well knew of this trap, this dangerous condition, the chemical substance and its deceptive appearance, and yet it had no warning signs of any kind posted.

37. That the defendant Company knew of the unsafe conditions and unnatural and deceptive conditions and maintained them without any notices to the public whatsoever, no warnings of any kind.

38. That James Heider underwent conscious pain and suffering.

39. That since the deceased James D. Heider was eight days old, he has lived with his grandparents Herbert A. Heider, and Alma Heider and that they have suffered by his death, and further that because of their ages, approximately fifty-five and forty-nine, they in their old age would have received some financial assistance if necessary from the deceased, if not legally, morally.

40. That the grandparents lived one block from their son and his wife, Beatrice, (the deceased's natural father and his step-mother) and that the deceased shared his time between both houses and was closely attached to his father and step-mother and his half brother and sister, and that they have suffered by his death.

41. That general and special damages exist as a result of the defendant negligence in failing to give and post warnings and in maintaining a dangerous deceptive and unnatural condition without providing safety precautions.

[fol. 9] 42. That the plaintiff, administrator, is the father of James Heider and David Heider, that he had an operation for cancer and has a limited life expectancy of approximately three (3) years, and that James Heider would have contributed to the support of his step-mother, Beatrice, during his lifetime after his fathers death, both morally and legally.

Wherefore, plaintiff prays for judgment in the amount of $200,000.00 plus costs and attorney fees.

Gregory M. Pillon, Attorney for Plaintiff, 1826 First National Building, Detroit 26, Michigan.

[fol. 10]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

ANSWER TO AMENDED DECLARATION—
Filed November 15, 1960

Now comes Michigan Sugar Company, a Michigan Corporation, by Smith, Brooker & Harvey, its attorneys, and

for its answer to plaintiff's amended declaration says as follows:

1. For answer to paragraph one of plaintiff's amended declaration, defendant neither admits nor denies the same, it not having sufficient information, knowledge or belief upon which to predicate either an admission or denial, and therefore leaves the plaintiff to his proof.

2. For answer to paragraphs two and three of said amended declaration, defendant admits the same.

3. For answer to paragraphs four through seven of plaintiff's amended declaration, defendant denies each and every allegation therein contained.

4. For answer to paragraph eight of plaintiff's amended declaration, defendant admits that in the operation of its plant, it maintains several acres of land, and that located upon said land are open ponds used to dispose of waste material, but defendant denies that said ponds are dangerous.

5. For answer to paragraphs nine, ten and eleven of plaintiff's amended declaration, defendant denies each and every allegation therein contained.

6. For answer to paragraph twelve of said declaration, defendant admits the same.

[fol. 11] 7. For answer to paragraphs thirteen and fourteen of said declaration, defendant denies each and every allegation therein contained.

8. For answer to paragraphs fifteen and sixteen of said declaration, defendant admits the same.

9. For answer to paragraphs seventeen through twenty-six of said declaration, defendant denies each and every allegation therein contained.

10. For answer to paragraphs twenty-seven, twenty-eight and twenty-nine, defendant neither admits nor denies

the allegations contained therein, it not having sufficient information knowledge or belief upon which to predicate either an admission or denial and therefore leave the plaintiff to his proof.

11. For answer to paragraph thirty of plaintiff's amended declaration, defendant neither admits nor denies the allegations contained therein, it not having sufficient information, knowledge or belief upon which to predicate either an admission or denial and therefore leave the plaintiff to his proof, except as to the allegations contained in said paragraph concerning plaintiff's decedent being misled which defendant denies.

12. For answer to paragraphs thirty-one and thirty-two of plaintiff's declaration, defendant denies each and every allegation therein contained.

13. For answer to paragraph thirty-three of said declaration, defendant admits the same.

14. For answer to paragraphs thirty-four through thirty-seven of plaintiff's declaration, defendant denies each and every allegation therein contained.

[fol. 12] 15. For answer to paragraph thirty-eight, thirty-nine and forty of said declaration, defendant neither admits nor denies the same, it not having sufficient information, knowledge or belief upon which to predicate either an admission or denial, and therefore leaves the plaintiff to his proof.

16. For answer to paragraph forty-one of plaintiff's declaration, defendant denies the allegations therein contained.

17. For answer to paragraph forty-two of plaintiff's declaration, defendant neither admits nor denies the same, it not having sufficient information, knowledge or belief upon which to predicate either an admission or denial, and therefore leaves the plaintiff to his proof.

New Matter and/or Affirmative Defenses

Further answering said declaration, defendant avers that if as plaintiff alleges, that James D. Heider and David Heider were on the premises for the purpose of trapping muskrats, that they were trespassers as such;

Further answering, defendant avers that if said persons were on his premises, they were upon said premises without his knowledge, without his consent and without invitation by defendant;

For further answer defendant avers that plaintiff's decedent was himself guilty of contributory negligence in going upon the ice across said pond;

For further answer, defendant avers that his premises were posted with no trespassing signs to warn and keep trespassers from its premises.

[fol. 13] Wherefore, defendant prays that said action be dismissed with costs to defendant.

Smith, Brooker & Harvey, By R. James Harvey, Attorneys for Defendant, 1232 North Michigan Avenue, Saginaw, Michigan.

Dated: November 1, 1960.

[fol. 14]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

MOTION FOR JURY TRIAL, AND FOR LEAVE TO AMEND DEFENDANT'S ANSWER—Filed February 3, 1961

Now comes defendant, Michigan Sugar Company, by its attorneys, Smith, Brooker & Harvey, and moves the Court to:

1. Grant a trial by jury in the above entitled cause for the reasons that:

A. The above entitled case is consolidated for trial with the case of Donald Heider, administrator of the

estate of David Heider, deceased, plaintiff, v. Michigan Sugar Company, a Michigan corporation, defendant, which case is to be tried by a jury.

B. Trial of one of two consolidated cases by jury unnecessarily complicates proofs.

C. Trial by jury of one of two consolidated cases will cause unnecessary confusion in the minds of the jury.

D. The interest of justice for both plaintiff and defendant demand uniformity of trial.

E. Defendant's failure to earlier request for trial by jury in this case was merely by inadvertence.

2. Defendant further moves the Court for leave to file an amended answer in the above entitled cause in order to allow defendant to plead affirmatively the contributory negligence of plaintiff and plaintiff's decedents, parents, [fol. 15] guardians and/or custodians, or persons standing in loco parentis, for the reason that:

A. Defendant's answer does not contain sufficient information to allow defendant to have his defense to this cause fully and fairly presented to the Court and jury.

B. Attorneys for the defendant at the time of filing the original answer herein were not in possession of all the facts relative to the cause of action of said plaintiff, and since the expiration of the time when defendant could file an amended answer without leave, they have learned additional facts which require a further and better statement of defendant's defenses to plaintiff's cause of action.

Smith, Brooker & Harvey, By Robert J. Stroebel, Attorneys for Defendant, 1232 N. Michigan Avenue, Saginaw, Michigan.

Dated this 1st day of February, A.D. 1961.

[fol. 17]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

No. 26686

DONALD HEIDER, Adm. JAMES HEIDER,

—v.—

MICH. SUGAR CO.

PROPOSED AMENDED ANSWER—Filed February 3, 1961

Now comes the defendant, Michigan Sugar Company, by its attorneys, Smith, Brooker & Harvey, and for its amended answer to plaintiff's amended declaration says as follows:

1. Defendant repeats word for word the admissions, denials, averments of its amended answer, filed November 1, 1960 in the above entitled cause, and in addition thereto, under the heading of New Matter and Affirmative Defense, and in addition to said new matters and affirmative defenses already pleaded, defendant avers:

That plaintiff, plaintiff's beneficiaries, plaintiff's decedent's parents, guardians, and/or custodians, or persons standing in loco parentis were guilty of contributory negligence in allowing plaintiff's decedent to trespass on defendant's property, whereupon said parties knew certain ponds to be then and there in existence, and

That plaintiff, plaintiff's beneficiaries, plaintiff's decedent's parents, guardians, and/or custodians, and/or [fol. 18] persons standing in loco parentis were guilty of contributory negligence in allowing twelve-year-old plaintiff's decedent to go trapping unattended by an adult in an area where said plaintiff, plaintiff's beneficiaries, plain-

tiff's decedent's parents, guardians, and/or custodians, and/or persons standing in loco parentis, knew or should have known that there were areas of frozen water and areas of open water, into which persons might fall.

Wherefore, defendant prays that said action be dismissed with cost to defendant.

Smith, Brooker & Harvey, By Robert J. Stroebel, Attorneys for Defendant, 1232 N. Michigan Avenue, Saginaw, Michigan.

Dated: February 1, 1961.

IN THE CIRCUIT COURT OF SAGINAW COUNTY

REPLY TO ANSWER TO AMENDED DECLARATION—
Filed February 6, 1961

Replying to the affirmative and/or new matter, plaintiff by his attorney states:

I.

As to the first paragraph thereunder, the plaintiff, denies the boys were trespassers.

II.

As to the second paragraph thereunder, the plaintiff denies that the boys were on the defendant's property without its knowledge, nor consent, nor invitation.

[fol. 19]

III.

As to the third paragraph thereunder, the plaintiff denies a contributory negligence of the deceased.

IV.

As to the fourth paragraph thereunder, the plaintiff denies the premises were posted with no trespassing signs to warn and keep trespassers from its premises.

Gregory M. Pillon, Attorney for Plaintiff, 1826 First National Building, Detroit 26, Michigan.

[fol. 20]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

TRANSCRIPT OF PRE-TRIAL PROCEEDINGS—May 26, 1960

(Consolidated cases)

Procedings had in the above entitled matters at the Pre-Trial Hearing before the Honorable Eugene Snow Huff, Circuit Judge, at Saginaw, Michigan, on Monday, May 23, 1960, at 3:45 o'clock p.m.

Appearances: Mr. Gregory M. Pillon, attorney on behalf of the plaintiff; Smith, Brooker & Harvey, attorneys on behalf of the defendant, by Mr. R. James Harvey.

The Court: Do you want to tell us now what this case is about?

Mr. Pillon: The two boys were brothers, James and David. On December 21, 1958 it was about 12 degrees below zero and they were muskrat hunting, they had some traps with them and they went onto some ponds that are maintained by the defendant. The ponds are places where the defendant dumps its waste or by-products from potatoes, which has got some chemicals in it. The ponds were frozen except right in the area where the waste material comes into the pond. It depends on how high the water level is, depends on whether it comes out above or below the water level of the pond.

[fol. 21] This was in December and we understand that the ponds were real high and the water comes out at sufficiently high temperatures and it has got chemicals in it and it does not freeze but makes a soapy substance that is

indistinguishable from snow to the average person that looks at it.

These boys were walking down on the frozen pond and they walked out and they came to an area where the chemicals come in here and they stepped onto this filmy substance and both of them drowned and their dog was with them and the dog drowned, too.

The Court: What do you claim, an attractive nuisance?

Mr. Pillon: No, no, no attractive nuisance at all.

The theory is that the defendant maintains a hazardous condition, not a natural pond or a lake or something like that but it maintains a hazardous condition, not only because of there being chemicals, but because of the fact that there was hot water and it was a soapy like substance and looked just like snow. In fact, they had a condition there that really amounted to a trap and these boys were misled. There were no warning signs at all telling them and that's really what—

Mr. Harvey: Our claim is that the boys were trespassers on our premises without our knowledge and without our consent and as such we owed no duty to them and we further allege that they were guilty of contributory negligence in going upon such a pond as a matter of fact, anyway.

In other words, it is something that a reasonable person can see, that you are walking out on a pond out there.

[fol. 22] The Court: Do you deny negligence?

Mr. Harvey: Yes.

The Court: You claim they were negligent?

Mr. Harvey: We deny negligence on our part and we think they were negligent in going on the pond.

The Court: You claim they were trespassers and you owed no duty?

Mr. Harvey: That's right. We claim they were trespassers.

The Court: The Court has already indicated that the case involves questions of both law and fact as to the

claimed negligence of the defendant and the claimed negligence on the part of the plaintiffs.

The question of whether or not plaintiffs were trespassers is disputed at this time by the defendant's counsel.

Anything else?

Mr. Pillon: Even if they were trespassers, of course, our contention is that they still have some duties toward minors who were trespassers upon the premises.

The Court: I understand, Mr. Pillon, you do not contend that a pond is an attractive nuisance?

Mr. Pillon: I can't see where a pond is an attractive nuisance.

The. Court: It is understood at this time that both parties desire to file amendments to the pleadings and that this will be done within 30 days from this date.

It is further understood and agreed between the parties that the attorneys will furnish to the opposing counsel in the case a list of the names and addresses of the witnesses whom they expect to use on the trial of these cases and that this will be done within the next 30 days.

It is understood that plaintiff's counsel desires to take pre-trial discovery depositions of certain of the defendant's employees and that this will be done at the mutual con-
[fol. 23] venience of the parties concerned between the 15th of August and the 1st of September.

(Photograph is marked Plaintiff's Exhibit No. 1.)

The Court: It is understood that plaintiff's counsel expects to offer certain photographs, of which Exhibit 1 is among the number, in evidence at the time of the trial and that he will submit these to defendant's counsel for examination at the discovery proceedings, at which time counsel will determine whether or not the exhibits will be received in evidence at the time of the trial without supporting proofs of whether an objection will be raised and further supporting evidence required.

It appears at this time that these cases will be consolidated for trial and disposed of in the same proceeding,

at which time only one is to be tried before a jury. However, both must be reset for trial on the same date while the jury is available.

The attorneys will continue negotiations looking toward a possible settlement out of court of both cases and will notify the Court immediately in the event they can be disposed of without a trial.

Eugene Snow Huff, Circuit Judge.

Dated: May 26, 1960.

[fol. 24]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

OPINION OF THE COURT—Filed May 10, 1962

(Consolidated cases)

This Court has before it for decision at this time two distinctly different but connected cases, both of which involve a number of novel legal questions. Undoubtedly it might be more discreet for this Court to withhold its decision on one of these cases until the Michigan Supreme Court has indicated its opinion on the companion case. Since it appears inevitable, however, that both eventually will reach the Michigan Supreme Court, this Court conceives it to be in the best interests of justice to state its rulings as quickly and succinctly as possible on all of the various questions involved in order to expedite progress of this whole litigation toward appeal and the ultimate conclusion.

In doing so, this Court frankly acknowledges the extraordinary effort and ability which has gone into the preparation of the oral arguments and the voluminous briefs submitted over a period of time by counsel along with the lengthy transcript of the trial proceedings, all of which are available now. As this Court proceeds to examine in detail each of the reasons defense counsel asserted in support of the motion for a judgment notwith-

standing the verdict, and in the alternative for a new trial in the case of David Heider, this Court was impressed again by the exceptional skill with which the able and experienced counsel on both sides presented their respective contentions throughout the entire proceedings. Consequently, this Court believes the record indicates that while all possible legal questions were raised and properly preserved for appeal, great care was taken to make certain [fol. 25] that the case was tried correctly and submitted fairly to the jury.

The jury instructions which defense counsel requested were given in so far as they accurately and appropriately set forth defendant's theory of the case. As plaintiff's counsel has specifically pointed out in his briefs, defendant's requests were refused only when they appeared to be improper because they assumed as facts matters actually in dispute, were argumentative, repetitious, overemphasized defendant's evidence, or were legally incorrect under the circumstances. Thus defendant's requested instruction that the ponds were constructed in accordance with government requirements for correction of water pollution would not be controlling on the question of whether or not they were negligently maintained with respect to trespassing children. The instructions claimed to be error, such as those on the presumption of decedents' freedom from contributory negligence, and deceaseds being trespassers as a matter of law, even if inaccurate, were probably more favorable than defendant deserved, since it appears that there was no evidence of any acts to support defendant's affirmative defense of contributory negligence or to rebut the presumption of deceaseds' due care. (Peklenk v. Isle Royal Copper Co., 187 Mich. 645.) Furthermore, some of plaintiff's evidence might well have been interpreted to indicate that deceased's were licensees in trapping muskrat pests on defendant's property. In addition, defendant does not seem to have demonstrated that any material error occurred in the admission or rejection of evidence during the course of the trial. As a result of

the errors which are claimed to have occurred actually appear upon re-examination at this time to be comparatively inconsequential, both with respect to their technical legal [fol. 26] significance and their actual effect upon the trial. In other words, without elaborating further upon the reasons which opposing counsel have so fully developed in their various briefs, this Court will state that it has carefully reconsidered all of the rulings made upon the evidence and the instructions during the course of the trial and for the reasons detailed by plaintiff's counsel in his briefs, is of the opinion that they were substantially correct under all the circumstances, and constituted no error as a matter of law. In any event, there appears to be no particular circumstance covered in defendant's motions which could be considered to have altered or affected the judgment as a matter of fact or should have overcome the statute which provides that:

> "No judgment or verdict shall be set aside or reversed, or a new trial be granted by any court in any civil case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the Court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MSA 27.2618.

The principal defense asserted in these two cases, both to the jury as a matter of fact, and also, to the Court as a matter of law, on motions for a directed verdict, and for a judgment nothwithstanding the verdict, was that the defendant Michigan Sugar Company was not guilty of any negligence in the operation of its business or the maintenance of its premises and that the unfortunate deaths on defendant's property resulted from an unavoidable accident or the contributory negligence of the parties themselves or their legal guardians.

[fol. 27] The facts in the two cases were comparatively clear and uncontroverted. On the afternoon of December 21, 1958, 12 year old James Heider and his 8 year old half brother, David Heider, received permission from their family to take their bicycle and their cocker spaniel to set out muskrat traps in the vicinity of their homes at Sebewaing, Michigan. When they did not return at the expected time, their grandparents went out to look for their, but without success. Later a search party discovered the bodies of the boys and their dog at the bottom of a pond on defendant's premises. This pond was a considerable distance inside defendant's property and was used to store water from defendant's sugar manufacturing plant until some time in the spring when the State permitted it to be released into the Saginaw Bay. Although none of defendant's employees was shown to have specific knowledge that children trespassed upon defendant's premises to trap, they knew that trespassers came upon defendant's land during the hunting and trapping seasons and that traps were set at the ponds to catch muskrats which frequented them and actually did considerable damage to company property by digging holes in defendant's dikes. Defendant company put up "no trespassing" signs at least twice a year but knew they did not remain in place and often were ignored.

On December 21, 1958, there was no sign in the vicinity of the pond which was largely frozen over in the 12 degree below zero temperature. A pipe was discharging into the pond water which apparently melted the nearby ice. It also formed a frothy foamlike substance which blew and billowed up a foot or more above the water and the surrounding ice and became covered with snow. There were no eye witnesses to the tragedy but the physical facts indicated that after walking across the ice on the pond, the [fol. 28] two boys and their dog all plunged through holes in the vicinity of the water pipe and were drowned.

Defendant company certainly was carrying on a legitimate business enterprise on its own premises. It was

quite clear from all the evidence in the case, however, that an extremely deceptive and treacherous condition existed in the surface of the ice around the pipe discharging water into the pond. Defendant easily could have employed some sort of a warning device and sign to serve as a notice or caution to trappers and trespassers who were known to use that area frequently. That would not have limited or interfered in any way with defendant's profitable conduct of its business.

On the basis of a careful consideration of all the evidence and the now well established law of this State, this Court concludes that neither the two boys nor their guardians were guilty of contributory negligence in this case and that the sole, proximate cause of their deaths in this tragic accident was the negligence of the defendant company in the maintenance of its premises contrary to the following legal principle:

> "A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety." (Lyshak v. City of Detroit, 351 Mich. 230; Nielsen v. Henry H. Stevens, Inc., 358 Mich. 130; 2 Restatement of Torts, Sec. 334, 339).

[fol. 29] This Court is inclined to agree with plaintiff's counsel that the crucial, controlling question in this case is as follows:

> "Was the jury's verdict for $125,000 damages for the death of David Heider excessive under all the circumstances?"

It certainly would have been so considered under the Michigan decisions prior to Wycko v. Gnodtke, 361 Mich. 331, as the dissenting opinion in that case so emphatically

declares. The present case of David Heider, however, was tried in the light of the then very recent ruling law which is proclaimed by the majority of the Michigan Supreme Court in the Wycko Case, supra. In other words, the trial court unequivocally accepted the statement in the majority opinion in the Wycko Case, supra, at p. 338, that, "We now reject * * * the child labor measure of the pecuniary loss suffered through the death of a minor child, namely, their probable wages less the cost of their keep, and all cases consistent therewith we now overrule."

The case was submitted to the jury, as nearly as possible in accordance with the new rule that, "The pecuniary value of a human life is a compound of many elements, including mutual society and protection and companionship." What these are worth in terms of dollars was not indicated by the Michigan Supreme Court, which instead expressly stated:

> "It is true, of course, that there will be uncertainties in all of these proofs, due to the nature of the case, but we are constrained to observe that it is not the privilege of him whose wrongful act caused the loss to hide behind the uncertainties inherent in the very [fol. 30] situation his wrong has created." p. 340, supra.

Both counsel here have offered in their arguments and briefs since the trial, widely different and extremely interesting examples of the increased income David's family might expect to obtain from investing in various ways the amount of money involved in this verdict. As this Court understands the majority opinion in the Wycko Case, however, the pecuniary loss resulting to a family from the death of a child is not measured solely by the extent to which the family's material standard of living is raised or lowered, by his being wrongfully removed from it forever, but by the value which can reasonably be attributed to the loss of mutual society and companionship suffered by the surviving members of the child's family.

It would seem to this Court that the pecuniary value of "mutual society, protection and companionship" would vary vastly with the precise circumstances of the particular individuals involved and might range from a very nominal to a most substantial amount, depending upon the jury's estimate of their importance to the parties. As a matter of fact and law, this is exactly what the courts of other States seem to have held when presented with this problem, which of course has not yet been judicially reviewed in this jurisdiction. Without attempting to emulate the eloquence of higher courts, who have substantiated comparable awards in child death cases, this Court selects from among the many cases cited by plaintiff's counsel, Sandifer Oil Company v. Dew, 71 So. 2d 725, 1954, where the Mississippi Supreme Court in affirming a $90,000 verdict for the death of a 12 year old girl uses language which appears applicable here when it states, "We cannot put a value on loss of companionship and society; that is the function of the jury." Thus this Court understands that in Stephens v. US Mobile Homes of Florida, Inc. (25 NACCA Law Journal 400), a Florida court sustained a jury verdict for [fol. 31] $150,000 for the death of electrocution of a 2½ year old child. In the present cause, an experienced jury of responsible, intelligent, business men and housewives heard the last jury case during that term of court and after an orderly trial which appeared to be unusually free from passion, prejudice, pressure, emotionalism or material error of any kind, rendered a verdict which it believed to be reasonable and just. This Court is not now inclined to alter it on the basis of the law and the facts before it.

In considering the case of James Heider, probably the most important question for this Court to decide is the amount of damages to be awarded. This Court finds from the evidence at the trial that the deceased James Heider had lived long enough to be able to demonstrate much more clearly than his younger brother David the talents, abilities, character, and accomplishments which gave such distinct and definite promise of a useful life and a good

citizen. As a consequence, it would seem to follow irrefutably that his death would occasion the greater loss, not only to the community but also to his whole family, and that therefore the damages should be higher in his than in his brother's case. This Court would be inclined to reach such a conclusion as a matter of simple and obvious justice. In the opinion of this Court, however, such a result does not appear to be permissible under the Michigan statute which creates the cause of action (Courtney v. Apple, 345 Mich. 223, headnotes 3 and 6; MSA 27.711). The statute and the Michigan cases construing it seem to have considered almost every contingency except the one which confronts the Court here. In MacDonald v. Quimby, 350 Mich. 21, which contains the most exhaustive analysis of the statute, the mother as well as the wife and children of the [fol. 32] deceased, was permitted to participate in the recovery of damages. Both opinions of the Court apparently concurred in the conclusion that: "Then term 'next of kin' as used in the death act means the nearest blood relations who suffer a pecuniary injury and not all those who would take under the statute of distribution." MacDonald v. Quimby, supra, headnote 6.

Inasmuch as the deceased James Heider apparently had no legal obligation to support his grandparents with whom he lived (MSA 16.122 and 16.125) or his half brothers or sisters (Richardson v. Detroit and M. Ry. Co., 176 Mich. 413, headnote 6) or his stepmother with whom he did not live (MSA 27.712; Stahl v. Grand Rapids and Ind. R.R. Co., 57 Mich. 239, headnote 6), it would appear that whatever their actual loss may have been under the circumstances, these relatives have sustained no pecuniary, legal damages as a result of James Heider's death (MacDonald v. Quimby, supra).

As defense counsel states,

> "It must be conceded that if defendant is found guilty of negligence, the plaintiff administrator could recover funeral expenses, beyond that we think no re-

covery should be allowed * * * on behalf of the father because (a) he had no right to recover for the cost of rearing the child because he incurred no expense in that regard. Whatever was expended by way of rearing the child was expended by the grandparents as volunteers. He should not be permitted to recover for loss of wages offset by room and board until age 21 because, by his own conduct, he had relinquished that right."

For the reasons already briefly mentioned earlier in this opinion, as well as those so elaborately set forth in the [fol. 33] lengthy dissenting opinion of Courtney v. Apple, 345 Mich. 223, pp. 237-260, this Court believes that to award damages only for James Heider's funeral expenses would be unreasonable if not actually unconscionable particularly in the light of the changed rule of law established by the Michigan court in the Wycko Case, supra." It seems obvious to this Court that under the rule in the Wycko Case supra, the plaintiff Donald Heider, father of James Heider, is entitled to damages for the costs of raising James Heider, which appear from the evidence submitted in support of plaintiff's bill of particulars to be at least $10,989.65, which is less than the average estimated in 39 Michigan Bar Journal 11 and 54 N.W. Law Review, 254. The fact that deceased's grandfather, instead of deceased's father, furnished most of this should not in the opinion of this Court relieve the wrongdoer of his liability for it, any more than the voluntary contribution of an injured employee's wages or the payment under the contract of hospital or insurance benefits relieves the wrongdoer from the damages inflicted upon the injured victim (Kurti v. Probelske, 324 Mich. 179, headnote 5; Cawood v. Earl Paige Co., 239 Mich. 485).

The other compensable element of damages which plaintiff sustained in the loss of the society and companionship of his oldest son James who had reached an age where he would have had more in common with his father and not only could have been expected to have brought for joy and

satisfaction to him in the few remaining years of his life expectancy, than at any other time, should be reasonably evaluated at a minimum of $30,000, in the opinion of this Court. As a consequence, plaintiff is awarded a judgment of $40,989.65 in the case of James Heider against the defendant, with costs to be taxed in one case only.

[fol. 34] Probably because of the size of the verdict and the consequent amount of interest which conceivably could accrue thereon, the attorneys have presented a number of authorities to support their respective contentions as to the time when interest should commence: This Court has carefully examined all of the citations and is convinced that in cases of this kind which involve unliquidated damages for personal injuries, as contrasted with actions based upon contract, or the loss of specific personal property, the great weight of both reason and authority requires that interest be computed from the date of the judgment. Motyka v. Detroit G.H. & M. Ry. Co., 260 Mich. 396, headnote 3 and p. 398.

This rule is expressly recognized and approved in Wilson v. Dohler-Jarvis, 358 Mich. 510, a workmen's compensation case which plaintiff's counsel cites to support his contention that interest should start with the decedent's death but which, on pp. 517-18 actually adopts the following language from 16 NACCA Law Journal, pp. 135-6:

> "Generally in personal injury cases, courts have declined to allow interest before the date of the judgment, whereas in actions ex contractu interest is allowed from the time of the accrual of the cause of action."

Although Larsen v. Home Telephone Company, 164 Mich. 295, headnote 8, seems to approve a different rule, this Court agrees with defense counsel that to adopt it here would be to compound the damages in improperly allowing interest twice inasmuch as the Court in its instructions to the jury followed the practice recommended in Larsen v. Home Telephone, supra, in these words:

[fol. 35] "It may be said that a more accurate computation would be to estimate the damages suffered to the date of the verdict and add to it the present value of prospective damages."

Probably the entire subject requires further clarification by our Supreme Court. Until then, however, it would appear that this Court is obliged to follow the rule laid down in Motyka v. Detroit Ry. Co., supra, headnote 3, which states the law that still seems to be applicable, and to award interest from the date of the entry of the final judgment in both cases.

Eugene Snow Huff, Circuit Judge.

Saginaw, Michigan,
May 9, 1962.

IN THE CIRCUIT COURT OF SAGINAW COUNTY

No. 26686

DONALD HEIDER, ADM. JAMES HEIDER,

v.

MICH. SUGAR CO.

JUDGMENT—Filed May 17, 1962

At a session of said Court held in the Court House in the City of Saginaw, in said County on the 17th day of May, A. D. 1962.

Present: Honorable Eugene Snow Huff, Circuit Judge.

The issues joined in this case having been tried by the Court without a jury, and the Court having rendered its verdict in favor of the plaintiff and against the defendant in the amount of forty thousand nine hundred and eighty-nine and 65/100 ($40,989.65) dollars;

[fol. 36] It is therefore ordered and adjudged that plaintiff recover against said defendant his damages in the sum of forty thousand nine hundred eighty-nine and 65/100 ($40,989.65) dollars.

This case having been tried in consolidation with a companion case of Donald Heider, Administrator of the Estate of David Heider, deceased, and costs having been taxed therein, no costs will be allowed in this case. It is further ordered that the plaintiff upon entry of said judgment have execution therefor.

Eugene Snow Huff, Circuit Judge.

NOTICE OF HEARING—Filed May 23, 1962

No. 26686

DONALD HEIDER, ADM. JAMES HEIDER,

v.

MICH. SUGAR CO.

To: Gregory M. Pillon, Attorney at Law, 1826 First National Building, Detroit 26, Michigan.

Please take notice that the attached defendant's motion for new trial will be brought on for hearing before the Honorable Eugene Snow Huff, Circuit Judge, at his Courtroom in Saginaw, Michigan, on Monday, May 28, 1962, at 10:00 A. M. or as soon thereafter as counsel can be heard.

Dated this 22nd day of May, 1962.

Smith, Brooker & Harvey, By Carl H. Smith, Sr., Attorneys for Defendant, 210-214 Phoenix Building, Bay City, Michigan.

[fol. 37]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

DEFENDANT'S MOTION FOR A NEW TRIAL—
Filed May 23, 1962

Now comes the above named defendant by Smith, Brooker & Harvey, its attorneys, and move the Court for an order setting aside the judgment heretofore entered in said cause on the 17th day of May, 1962, and granting a new trial therein for the following reasons:

1. Because the judgment rendered by the Court therein is clearly excessive.

2. Because the judgment is against the preponderance of the evidence.

3. Because there is a total lack of evidence to support the verdict and judgment entered therein.

4. Because the Court erred in permitting the plaintiff to give in evidence, over the objection of counsel for the defendant, testimony regarding the alleged plans of the deceased in selecting a career.

5. Because the Court erred in permitting the witness Donald Heider to testify over the objection of defendant's counsel as to the reason why he was discharged from Jackson Prison, the testimony being hearsay and a self-serving declaration.

The Court is hereby requested to state in writing its reason for the decision on said motion.

Dated this 22nd day of May, 1962.

Smith, Brooker & Harvey, By Carl H. Smith, Sr.,
Attorneys for Defendant, 210-214 Phoenix Building, Bay City, Michigan.

[fol. 38]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

ANSWER TO DEFENDANT'S MOTION FOR NEW TRIAL—
Filed May 28, 1962

Now comes the plaintiff, by his attorney, Gregory M. Pillon, and answer the defendant's motion for new trial as follows:

1. Answering the allegation contained in paragraph one, the plaintiff denies that the judgment is excessive.

[fol, 39] 2. Answering paragraph two, plaintiff denies that the judgment is against the preponderance of the evidence.

3. Answering paragraph three, plaintiff denies that there is a total lack of evidence to support the verdict and judgment entered therein.

4. Answering paragraph four, plaintiff denies that the Court erred in permitting the plaintiff to give in evidence, over the objection of counsel for the defendant, testimony regarding the alleged plans of the deceased in selecting a career.

5. Answering paragraph five, plaintiff denies that the Court erred in permitting the witness Donald Heider to testify over the objection of defendant's counsel as to the reason why he was discharged from Jackson Prison, and denies that the testimony was hearsay and a self-serving declaration, and further that it was the reason for his discharge.

That the briefs heretofore filed in the companion case cover adequately the questions here raised.

Wherefore, plaintiff prays that the defendant's motion for new trial be denied.

Gregory M. Pillon, 821 Bates Street, Detroit 26, Michigan, Attorney for Plaintiff.

[fol. 40]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

ORDER DENYING MOTION FOR NEW TRIAL—
Filed May 28, 1962

At a session of said Court held in the City of Saginaw, County of Saginaw, this 28th day of May, A. D. 1962.

Present: Honorable Eugene Snow Huff, Circuit Judge.

This cause having come on to be heard,

Upon motion filed by the defendant, and the Court having heard argument,

Upon motion of Gregory M. Pillon, attorney for the plaintiff,

It is hereby ordered that the defendant's motion for new trial be denied, for the reasons set forth in the court's opinion dated May 9, 1962.

Eugene Snow Huff, Circuit Judge.

[fol. 42]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

CLAIM OF APPEAL—Filed May 31, 1962

Now comes the above named defendant and appellant, Michigan Sugar Company, a corporation, and claims an appeal to the Supreme Court from the judgment of the Circuit Court for the County of Saginaw, State of Michigan, entered in said cause on the 17th day of May, A. D. 1962.

Appellant takes a general appeal.

Dated this 31st day of May, A. D. 1962.

Smith, Brooker & Harvey, By Carl H. Smith, Sr., Attorneys for Defendant and Appellant, 212 Phoenix Building, Bay City, Michigan.

[fol. 54]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

No. 26687

DONALD HEIDER, ADM. DAVID HEIDER,

v.

MICH. SUGAR CO.

AMENDED DECLARATION—Filed October 25, 1960

Now comes Donald Heider, administrator of the Estate of David Heider, by his attorney, Gregory M. Pillon and states:

1. That on or about November 12, 1959, he was duly appointed Administrator of the Estate of David Heider, by the Probate Court of Huron County, and was duly authorized by said Court to institute this action for wrongful death.

2. That the defendant, Michigan Sugar Co., is a Michigan Corporation, duly domiciled in Saginaw County.

3. That the defendant, Michigan Sugar Co., operates sugar beet plants and maintains a sugar plant at Sebewaing, Michigan.

4. That the defendant knew that persons came onto their land where their artificial storage ponds are located to hunt.

5. That the defendant knew persons came on their land where their artificial storage ponds are located to trap for muskrats, mink, etc.

6. That the defendant knew persons in general from time to time came onto their land where their artificial storage ponds are located for purposes other than hunting or fishing.

7. That the defendant in the exercise of ordinary care should have known that persons came onto their land where their artificial storage ponds are located.

[fol. 55] 8. That in the operation of this plant, the defendant Company maintains acres of large, open, dangerous, unnatural chemical ponds used to dispose of waste material.

9. That this by-product appears in a watery form, but contains dangerous chemicals harmful to human life.

10. That the chemicals are inherently dangerous making it impossible for anyone to swim therein, and therefore constitutes a trap.

11. That the chemicals form a top surface of a snow like appearance in many places, and during the winter months, it is impossible to tell by sight which is truly snow or ice, and which is truly chemical.

12. That the defendant knew that their waste products formed on the surface of waste, a foamy like substance.

13. That this foamy substance has the appearance of snow or whipped ice.

14. That the defendant in the course of its business should have known that their waste products formed on the surface of the waste liquid, a foamy like substance that has the appearance of snow or whipped ice.

15. That the defendant knew that in cold weather, their ponds froze, except around immediate areas where their chemical waste products came into the ponds.

16. That the defendant in the course of ordinary care should have known that part of the pond areas froze and that part of it didn't.

17. That the defendant in the course of ordinary care should have known that persons walking on the frozen portion of the ponds would be misled by the foamy substance

[fol. 56] and believe the entire pond frozen, and could drown.

18. That the defendant knew that it would be difficult to distinguish the foamy appearance of part of their pond area from the rest of the pond area and that somebody could drown as a result thereof.

19. That the defendant knew or should have known that somebody could be misled or entrapped by the dangerous and deceptive conditions they maintained.

20. That the defendant could foresee that if somebody walked on the frozen part of their ponds, that person could be entrapped or misled to their death by the maintenance of the ponds in the conditions they were kept without adequate warning or protection and especially so with a child.

21. That the defendant failed to have any warning signs and failed to maintain the property to protect children.

22. That David Heider and James Heider were on the defendant's premises with its implied consent.

23. That David and James Heider were on the defendant's premises with its consent.

24. That David Heider and James Heider were licensee's on the defendant's premises.

25. That David and James Heider were invitee's on the defendant's premises.

26. That the defendant violated Section 28.761 M. S. A. being C. L. of 1948 Section 750.493 and Section 28.761 M. S. A. being Act 102 of the Public Acts of 1952 and as a direct violation thereof, David and James Heider drowned, [fol. 57] the same being incorporated herein by reference thereto.

27. That David Heider is the minor son of the plaintiff, Donald Heider, and on the 21st day of December, 1958 said son with his brother, James Donald Heider and their dog set out muskrat trapping.

28. That David Heider with his brother and dog entered the defendant's premises and walked onto one of the defendant chemical ponds.

29. That at the time and place, to wit, December 21, 1958 it was approximately 12 degrees below zero.

30. That after walking on said chemical pond on solid ice, they came to an area where the defendant Company, pumped hot snow like substance into the pond, and this, David Heider, his brother James and their dog were misled by the snow like hot chemical and stepped off the ice into the chemical, and after a short struggle, David Heider, his brother James Donald and their dog all drowned.

31. That the overflow pipe, or pipe out of which the chemicals flowed into the pond was hidden in weeds and thicket which the defendant knew or should have known.

32. That the level of the contents of the chemicals in the pond came up to the level of the pipe and with the soapy like substance concealed the pipe from view which the defendant knew or should have known.

33. That the water and chemicals flowing into the pond did not freeze at or near this pipe, although the rest of the pond was frozen solid and the defendant knew this or should have known this.

34. That even though the defendant knew that it maintained ponds that were frozen and knew that at and near the areas of inflow into the ponds the ponds did not freeze, it posted no warning of any kind.

[fol. 58] 35. That David, James and the dog could swim, but because of the dangerous chemicals, the heat and the snow like substance, they were entrapped and drowned.

36. That the defendant Company well knew of this trap, this dangerous condition, the chemical substance and its deceptive appearance, and yet it had posted no warning signs of any kind.

37. That the defendant Company knew of the unsafe conditions and unnatural and deceptive conditions, and maintained them without any notices to the public whatsoever, no warnings of any kind.

38. That David Heider underwent conscious pain and suffering.

39. That the parents of David Heider have suffered by his wrongful death.

40. That general and special damages exist as a result of the defendant negligence in failing to give and post warnings and in maintaining a dangerous deceptive and unnatural condition without providing safety precautions.

41. That the plaintiff, administrator, is the father of David and James Heider, that he had an operation for cancer and has a limited life expectancy of approximately three (3) years, and that David Heider would have contributed to the support of his mother, Beautrice, during his lifetime after his father's death, both morally and legally.

Wherefore, plaintiff prays for a judgment of $200,000.00 plus costs and attorney fees.

Gregory M. Pillon, Attorney for Plaintiff, 1826 First National Building, Detroit 26, Michigan.

[fol. 60]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

ANSWER TO AMENDED DECLARATION—
Filed November 15, 1960

Now comes Michigan Sugar Company, a Michigan Corporation, by Smith, Brooker & Harvey, its attorneys, and for its answer to plaintiff's amended declaration says as follows:

1. For answer to paragraph one of plaintiff's amended declaration, defendant neither admits nor denies the same,

it not having sufficient information, knowledge or belief upon which to predicate either an admission or denial, and therefore leaves the plaintiff to his proof.

2. For answer to paragraphs two and three of said amended declaration, defendant admits the same.

3. For answer to paragraphs four through seven of plaintiff's amended declaration, defendant denies each and every allegation therein contained.

4. For answer to paragraph eight of plaintiff's amended declaration, defendant admits that in the operation of its plant, it maintains several acres of land, and that located upon said land are open ponds used to dispose of waste material, but defendant denies that said ponds are dangerous.

5. For answer to paragraph's nine, ten and eleven of plaintiff's amended declaration, defendant denies each and every allegation therein contained.

6. For answer to paragraph twelve of said declaration defendant admits the same.

[fol. 61] 7. For answer to paragraphs thirteen and fourteen of said declaration, defendant denies each and every allegation therein contained.

8. For answer to paragraphs fifteen and sixteen of said declaration, defendant admits the same.

9. For answer to paragraphs seventeen through twenty-six of said declaration, defendant denies each and every allegation therein contained.

10. For answer to paragraphs twenty-seven, twenty-eight and twenty-nine, defendant neither admits nor denies the allegations contained therein, it not having sufficient information, knowledge or belief upon which to predicate either an admission or denial and therefore leave the plaintiff to his proof.

11. For answer to paragraph thirty of plaintiff's amended declaration, defendant neither admits nor denies the allegations contained therein, it not having sufficient information, knowledge or belief upon which to predicate either an admission or denial and therefore leave the plaintiff to his proof, except as to the allegations contained in said paragraph concerning plaintiff's decedent being misled which defendant denies.

12. For answer to paragraph thirty-one and thirty-two of plaintiff's declaration, defendant denies each and every allegation therein contained.

13. For answer to paragraph thirty-three of said declaration, defendant admits the same.

14. For answer to paragraphs thirty-four through thirty-seven of plaintiff's declaration, defendant denies each and every allegation therein contained.

[fol. 62] 15. For answer to paragraph thirty-eight and thirty-nine of said declaration, defendant neither admits nor denies the allegations contained therein, it not having sufficient information, knowledge or belief upon which to predicate either an admission or denial, and therefore leaves the plaintiff to his proof.

16. For answer to paragraph forty of plaintiff's amended declaration, defendant denies each and every allegation contained therein.

17. For answer to paragraph forty-one of plaintiff's declaration, defendant neither admits nor denies the same, it not having sufficient information, knowledge or belief upon which to predicate either an admission or denial, and therefore leaves the plaintiff to his proof.

New Matter and/or Affirmative Defense

Further answering said declaration, defendant avers that if as plaintiff alleges, that James D. Heider and David

Heider were on the premises for the purpose of trapping muskrats, that they were trespassers as such;

Further answering defendant avers that if said persons were on his premises, they were upon said premises without his knowledge, without his consent and without invitation by defendant;

For further answer defendant avers that plaintiff's decedent was himself guilty of contributory negligence in going upon the ice across said pond.

For further answer, defendant avers that his premises were posted with no trespassing signs to warn and keep trespassers from its premises.

[fol. 63] Wherefore, defendant prays that said action be dismissed with costs to defendant.

Smith, Brooker & Harvey, By R. James Harvey, Attorneys for Defendant, 1232 North Michigan Avenue, Saginaw, Michigan.

Dated: November 7, 1960.

[fol. 64]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

MOTION FOR LEAVE TO AMEND DEFENDANT'S ANSWER—Filed February 3, 1961

Now comes defendant, Michigan Sugar Company, by its attorneys, Smith, Brooker & Harvey, and moves the Court for leave to file an Amended Answer in the above entitled cause, in order to allow defendant to plead affirmatively the contributory negligence of plaintiff, plaintiff's decedent's parents, guardians, and/or custodians, and/or persons standing in loci parentis, and plaintiff's beneficiaries, for reasons that

(a) Defendant's answer does not contain sufficient information to allow defendant to have his defense to this cause fully and fairly presented to the Court and jury.

(b) Attorneys for the defendant, at the time of filing the original answer herein, were not in possession of all the facts relative to the cause of action of said plaintiff, and since the expiration of the time when defendant could have filed an amended answer without leave, they have learned additional facts which require further and better statement of defendant's defenses to plaintiff's cause of action.

Dated this first day of February, A. D. 1961.

Smith, Brooker & Harvey, By Robert J. Stroebel, Attorneys for Defendant, 1232 N. Michigan Avenue, Saginaw, Michigan.

[fol. 66]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

PROPOSED AMENDED ANSWER—Filed February 3, 1961

Now comes the defendant, Michigan Sugar Company, by its attorneys, Smith, Brooker & Harvey, and for its amended answer to plaintiff's amended declaration says as follows:

1. Defendant repeats word for word the admissions, denials, averments of its amended answer, filed November 1, 1960, in the above entitled cause, and in addition thereto, under the heading of New Matter and Affirmative Defense, and in addition to said new matters and affirmative defenses already pleaded, defendant avers

That plaintiff, plaintiff's beneficiaries, plaintiff's decedent's parents, guardians, and/or custodians, or persons standing in loco parentis were guilty of contributory negligence in allowing plaintiff's decedent to trespass on defendant's property, whereon said parties knew certain ponds to be then and there in existence, and

That plaintiff, plaintiff's beneficiaries, plaintiff's decedent's parents, guardians, and/or custodians, and/or persons standing in loco parentis were guilty of contributory

negligence in allowing eight-year-old plaintiff's decedent to go trapping unattended by an adult in an area where said plaintiff, plaintiff's beneficiaries, plaintiff's decedent's parents, guardians, and/or custodians, and/or persons standing in loco parentis, knew or should have known that there were areas of frozen water and areas of open water, into which persons might fall.

[fol. 67] Wherefore, defendant prays that said action be dismissed with cost to defendant.

Dated this 1st day of February, A. D. 1961.

Smith, Brooker & Harvey, By: Robert J. Stroebel, 1232 N. Michigan Avenue, Saginaw, Michigan, Attorneys for Defendant.

IN THE CIRCUIT COURT OF SAGINAW COUNTY

REPLY TO ANSWER TO AMENDED DECLARATION—
Filed February 6, 1961

Replying to the affirmative and or new matter, plaintiff by his attorney states:

I.

As to the first paragraph thereunder, the plaintiff denies the boys were trespassers.

II.

As to the second paragraph thereunder, the plaintiff denies that the boys were on the defendant's property without its knowledge, nor consent, nor invitation.

III.

As to the third paragraph thereunder, the plaintiff denies any contributory negligence of the deceased.

[fol. 68] IV.

As to the fourth paragraph thereunder, the plaintiff denies the premises were posted with no trespassing signs to warn and keep trespassers from its premises.

Gregory M. Pillon, Attorney for Plaintiff, 1826 First National Building, Detroit 26, Michigan.

[fol. 69]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

SPECIAL QUESTIONS

Question No. 1—Was the pond where the boys met their death a place where the Michigan Sugar Company knew, or should have known, that children were likely to trespass? [x] Yes [ ] No

Question No. 2—Was the place where the boys met their death a place where a condition existed which the Michigan Sugar Company knew, or should have known, involved an unreasonable risk of death to child trespassers? [x] Yes [ ] No

Question No. 3—Was the utility of maintaining the pond by the Michigan Sugar Company in the condition it was slight as compared to the risk to child traspassers as involved therein? [x] Yes [ ] No

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[fol. 70]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

DEFENDANT'S MOTION FOR A NEW TRIAL—
Filed February 28, 1961

Now comes the above named defendant by its attorneys, Smith, Brooker & Harvey, and moves the Court for an order setting aside the verdict in said cause and granting a new trial therein for the following reasons:

1. Because the verdict of the jury is clearly excessive.

2. Because the verdict rendered therein is not supported by credible evidence.

3. Because the verdict of the jury rendered therein is contrary to law.

4. Because the verdict therein is contrary to the great weight of the evidence.

5. Because the Court erred in refusing to instruct the jury in accordance with the defendant's request No. 2 as follows:

> [fol. 71] "I charge you members of the jury that the deceased James Heider and David Heider were both trespassers upon the property of the Michigan Sugar Company and as trespassers, the defendant, Michigan Sugar Company, owed no duty to them unless and until it became aware of their presence upon the property on which they were trespassing or unless from all of the circumstances here given in evidence to show that their presence upon the property should have been known to the Michigan Sugar Company, defendant, you conclude that the defendant should have known that the children were likely to trespass upon the premises and, more particularly, upon the portion of the Michigan Sugar Company premises where the deceased children met their death."

6. Because the Court erred in refusing to charge the jury in accordance with the defendant's request No. 3 reading as follows:

> "I charge you members of the jury that before you can charge the defendant with negligence in this case in the maintenance of their premises, you must find that the Michigan Sugar Company either knew or should have known that children were likely to trespass upon that portion of the defendant's premises where the pond was located in which the children met their death. In considering the likelihood that the de-

fendant should know that children were likely to trespass, you may weigh the possibility of such trespass in the locale where the pond in which they drowned was located, having in mind its isolation from the highway, the fact there were other ponds which separated it from the highway, the difficulty of access to it, the fact [fol. 72] that trespass upon the railroad property was necessary in order to get to it by the route which the children took and any other fact and circumstances here in evidence which you may deem relevant as throwing light upon the proposition that the Michigan Sugar Company should have known that children were likely to trespass in this portion of defendant's premises."

7. Because the Court erred in refusing to instruct the jury in accordance with the defendant's request No. 4 reading as follows:

"I charge you further members of the jury that before you may find the defendant guilty of negligence in this case, you must find that the condition of the pond in which the children drowned was one, which the Michigan Sugar Company knew or should have known, involved an unreasonable risk of death or serious bodily harm to children who might be trespassing upon the premises. In weighing this proposition, you must take into account the fact that the ponds which were constructed by the Michigan Sugar Company were constructed in a manner which was necessary to the use for which they were adapted; that they were adapted at the instance of the State authority having control of stream pollution and were of a type and fashion which were necessary to accomplish the thing which was required in the operation of the company's business. You should further consider the fact that there is evidence in this case from which you properly might infer that the children were aware of the character of the ice upon which they were walking and of the

likelihood that there might be thin ice in the area. [fol. 73] I refer specifically to the testimony that there were holes in the ice which apparently were made by a stick or probe which may have been in the hands of the deceased children."

8. Because the Court erred in refusing to instruct the jury in accordance with the defendant's request No. 5 reading as follows:

"I charge you further that before you can find the defendant Michigan Sugar Company negligent in this case, you must further find that the deceased children, because of their youth, did not discover the condition that existed at the lime pond and did not realize the risk involved in intermeddling in it or coming within the area made dangerous by it. In other words, you must find that the children did not discover the presence of the open water caused by the emptying of the pipe into the pond, did not realize the risk they were taking in walking upon the ice toward the open water and did not know that they were approaching an area of danger as they went towards the open water."

9. Because the Court erred in permitting the plaintiff over objections of defendant's counsel to give testimony regarding the daily wage scales in several plants in and around the City of Sebewaing and Bay City as well as other places.

10. Because the Court erred in permitting the plaintiffs to give in evidence, over the objection of counsel for the defendant, testimony regarding the alleged plans of the deceased in selecting a career.

11. Because the Court erred in charging the jury as follows:

[fol. 74] "In considering the alleged negligence of the defendant here, it is the law that one who maintains

on his premises an artificial condition is liable for resulting injury to young children present thereon, if

A. The place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

B. The condition is one of which the possessor knows or should know, which he realizes or should realize, as involving an unreasonable risk of death or serious bodily injury to such children, and

C. The children because of their youth do not discover the condition or realize the risk involved in their intermeddling in it or in coming within the area made dangerous by it, and

D. The utility to the possessor of maintaining the condition is slight as compared to the risk of young children involved therein.

In applying those foregoing rules, whether plaintiff was on the defendant's premises by express or implied invitation or by acquiescence of the defendant or contrary to the defendant's wishes and as a trespasser, is immaterial to plaintiff's right to recover, if plaintiff has established by a fair preponderance of the evidence, each of the foregoing conditions."

12. Because the Court erred in charging the jury as follows:

"The defendant Michigan Sugar Company is under an obligation to know the condition or conditions of [fol. 75] its premises. It is no defense that the defendant had no actual knowledge if a dangerous condition existed on its premises because it must use reasonable means to know the condition of the premises and to use reasonable care in maintaining them.

The greater the danger, the more care must be exercised and under any circumstances the defendant

must use such reasonable care as to make a dangerous condition as safe as the defendant can reasonably do, without being excessively burdensome under all the surrounding circumstances, and the conditions prevailing.

Further, if you find that the boys were trespassers, and the defendant Michigan Sugar Company knew or should have known that children trespass, the Michigan Sugar Company would be responsible and liable for failure to carry on an activity involving a risk to such children without reasonable care for their safety.

There is a duty placed by law upon the defendant in relation to children whom defendant knew or should have known were trespassing upon the defendant's premises, that requires defendant to use reasonble care for their safety."

13. Because the Court erred in charging the jury as follows:

"In this connection, you must keep in mind and consider whether the defendant company in the construction or maintenance of the pond created a hazard which was unnecessary to the operation of the pond area and which would be likely to cause injury to tres- [fol. 76] passing children known to the company or whom the company should have known would be likely to come upon the pond area.

If a dangerous condition exists, the Michigan Sugar Company is not required to maintain any safety device or warning system if the cost of such would be an unreasonable burden financially.

As I may have indicated before, and as I will state here for further certainty, in order for the plaintiff to recover damages in this action for the claimed negligence of the defendant Sugar Company, it is sufficient for the plaintiff Donald Heider to prove by a

preponderance of the evidence that negligence on the part of the defendant Michigan Sugar Company, its agents or employees, in some particular claim proximately caused the injury to the plaintiff or the death of the minor child David Heider."

14. Because the Court erred in charging the jury as follows:

"I will say further in this connection that in the absence of evidence to the contrary, the law presumes that the deceased children did everything that reasonable and prudent children of that age would have done under the same circumstances for their own safety.

In other words, until the contrary is proved, there is a presumption that the minor children were using due and proper care of ordinary children of those ages for the protection of their own safety and the preservation of their own lives at the time of their drowning.

[fol. 77] This presumption arises from the instinct of self-preservation and the disposition to avoid personal harm. The presumption is not conclusive but is a matter to be considered by the jury in connection with all other facts and circumstances in the case, in determining whether or not the deceased children were guilty of contributory negligence at the time of the accident, as the defendant claims that they were."

The Court is hereby requested to file reasons in writing in case said new trial is denied.

This motion is based upon the files and records in said cause and the evidence and proceedings on trial thereof.

Dated this 27th day of February, A.D. 1961.

Smith, Brooker & Harvey, By Carl H. Smith, Sr., Attorneys for Defendant, 210-214 Phoenix Building, Bay City, Michigan.

IN THE CIRCUIT COURT OF SAGINAW COUNTY

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT—February 27, 1961

Now comes the above named defendant by Smith, Brooker & Harvey, its attorneys at law, and moves the Court to enter judgment for the defendant notwithstanding the verdict for plaintiff heretofore rendered by the jury in said cause.

The grounds of this motion are those grounds stated at the time the defendant made its motion for directed [fol. 78] verdict at the conclusion of plaintiff's proofs, and by way of reiteration but not by way of exclusion, are as follows:

1. The plaintiff failed to prove any negligence on the part of the defendant which was a proximate cause of the death of the child.

2. For the reason that the plaintiff's proof established contributory negligence as a matter of law on the part of the plaintiff claimants.

3. That the plaintiff failed to prove that the defendant maintained a condition on its premises at the point where the children met their death which the defendant knew or should have known was a place where children were likely to trespass.

4. That the plaintiff failed to prove that the defendant maintained a condition at the place where the children were drowned which was one it knew or should have known involved an unreasonable risk of death or serious bodily injury to children.

5. The plaintiff failed to produce any evidence to establish that the defendant knew or should have known that children were trespassing in the area of the pond where they met their death.

The defendant requests the Court to file in writing the reasons and grounds upon which his decision disposing of the Motion is based.

Dated this 27th day of February, A.D., 1961.

Smith, Brooker & Harvey, By Carl H. Smith, Sr., Attorneys for Defendant, 210-214 Phoenix Building, Bay City, Michigan.

[fol. 79]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

DEFENDANT'S AMENDMENT TO MOTION FOR NEW TRIAL—
Filed April 17, 1961

Now comes the above named defendant by Smith, Brooker & Harvey, its attorneys and files this its amendment to its motion for an order setting aside the verdict in said cause and granting a new trial therein for the following additional reasons:

15. Because the Court erred in permitting the plaintiff, over the objection of defendant's counsel, to permit testimony of the witness Floyd Taylor regarding common knowledge that defendant's premises were used for trapping (209).

16. The Court erred in permitting the witness Donald Heider to testify over the objection of defendant's counsel as to the reason why he was discharged from Jackson Prison, the testimony being hearsay and a self-serving declaration (322-323).

17. Because the Court erred in permitting the plaintiff's witness Beatrice Heider to testify as to whether she would work and as to what her earnings would be in the event of her husband's death (351, 352, 353).

18. The Court erred in admitting testimony, over the objection of defendant's counsel, by Beatrice Heider as to

what it would cost her to live (354) and how much support she would need from her son David (355).

[fol. 80] This motion is based on the files and records of said cause and the transcript of the testimony thereof.

Dated this 17th day of April, 1961.

Smith, Brooker & Harvey, By Carl H. Smith, Sr., 210-214 Phoenix Building, Bay City, Michigan, Attorneys for Plaintiff.

IN THE CIRCUIT COURT OF SAGINAW COUNTY

JUDGMENT FOR PLAINTIFF—Filed May 17, 1962

At a session of said Court, held in the Court house, in the City of Saginaw, Michigan, this 17th day of May, A. D., 1962.

Present: Hon. Eugene Snow Huff, Circuit Judge.

The jury, by whom issue joined in this cause was tried, having heretofore rendered a verdict on the 15th day of February, A. D., 1961, in favor of the plaintiff and against the defendant, in the sum of $125,000.00 over and above any taxable costs. The defendant having filed a motion for a judgment notwithstanding the verdict, and in the alternative a motion for new trial and the plaintiff having filed a cross motion for interest to run on said judgment from the date of death, or in the alternative from the date of filing the complaint, and the court having heard argument of counsel and having read the lengthy briefs submitted by counsel and being fully advised in the premises.

[fol. 81] Upon motion of Gregory M. Pillon,

It is hereby ordered and adjudged that the plaintiff recover against the defendant, the sum of $125,000.00 as damages, together with costs to be taxed and have execution therefor.

It is further ordered the defendant's motion for judgment notwithstanding the verdict is denied and the defendant's motion for new trial is denied.

Eugene Snow Huff, Circuit Judge.

IN THE CIRCUIT COURT OF SAGINAW COUNTY

ANSWER TO DEFENDANT'S MOTION FOR NEW TRIAL—
Filed May 28, 1962

Now comes the plaintiff, by his attorney, Gregory M. Pillon and answers the defendant's motion for new trial as follows:

1. Plaintiff denies the allegations contained in paragraphs one, two, three and four, for the reason they are untrue.

2. Plaintiff denies the allegations contained in paragraph five, and further states that the substance of this charge was given.

3. Plaintiff denies the allegations contained in paragraphs six and seven, for the reason they are untrue.

4. Plaintiff denies the allegations contained in paragraph eight, and further states that the substance of this charge was given.

[fol. 82] 5. Plaintiff denies the allegations contained in paragraphs nine and ten, for the reason they are untrue.

6. Answering paragraph eleven, the plaintiff states that this charge was requested by the defendant, so he should not now complain.

7. Plaintiff denies the allegations contained in paragraphs twelve, thirteen and fourteen, and further states that in regard to paragraph fourteen, all the jury charges as a whole were fairly instructed by the court.

Wherefore, the plaintiff prays that the defendant's motion be denied.

Gregory M. Pillon, Attorney for Plaintiff, 1826 First National Building, Detroit 26, Michigan.

IN THE CIRCUIT COURT OF SAGINAW COUNTY

ANSWER TO DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT—Filed May 28, 1962

Now comes the plaintiff, by his attorney, Gregory M. Pillon and answers the defendant's motion as follows:

1. Plaintiff denies the allegations contained in paragraph one, for the reason it is untrue.

2. Plaintiff denies the allegation contained in paragraph two, for the reason it is untrue.

3. Plaintiff denies the allegation contain in paragraph three for the reason it is untrue.

[fol. 83] 4. Plaintiff denies the allegation contained in paragraph four, for the reason it is untrue.

5. Plaintiff denies the allegation contained in paragraph five, for the reason it is untrue.

Wherefore, the plaintiff prays that the defendant's motion be denied.

Gregory M. Pillon, 1826 First National Building, Detroit 26, Michigan, Attorney for Plaintiff.

[fol. 85]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

CLAIM OF APPEAL—Filed May 31, 1962

Now comes the above named defendant and appellant, Michigan Sugar Company, a corporation, and claims an appeal to the Supreme Court from the judgment of the Circuit Court for the County of Saginaw, State of Michigan, entered in said cause on the 17th day of May, A. D. 1962.

[fol. 86] Appellant takes a general appeal.

Dated this 31st day of May, A. D. 1962.

Smith, Brooker & Harvey, By: Carl H. Smith, Sr., Attorneys for Defendant and Appellant, 212 Phoenix Building, Bay City, Michigan.

[fol. 97a]

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

EXCERPT FROM PROCEEDINGS

OPENING STATEMENT OF PLAINTIFF—February 9, 1961

APPEARANCES:

Mr. Gregory M. Pillon, Attorney on behalf of Plaintiff;

Smith, Brooker & Harvey, Attorneys on behalf of Defendant, by Mr. Carl H. Smith, Sr., and Mr. Robert J. Stroebel.

[fol. 97b] Mr. Pillon: Your Honor, ladies and gentlemen of the jury:

Now that we are through with the formalities of selecting the jury, it is my duty to explain to you about the case in what is known as the opening statement by the plaintiff.

Now, I would like to explain to you in detail about the case so when the evidence comes from the witness stand you will have an understanding of it.

First of all, this case involves a drowning of a boy. Now, you are specifically trying the case of Donald Heider, Administrator of the estate of David Heider, deceased v. Michigan Sugar Company.

Now, Donald Heider was appointed by the Probate Court as administrator of the Estate of David Heider and as such administrator he is entitled to bring this action in this court.

David Heider is the son of Donald Heider. He was 8 years of age at the time of this tragedy and the way the case is brought, it is brought under what is known as the wrongful death section.

Now, that merely means that it is an action in which the plaintiff claims that the defendant is responsible under the wrongful death act. The defendant was negligent or careless, which is really what it means, and as a result of the defendant's carelessness or lack of care, why, the plaintiff has the cause of action for his son's death.

[fol. 97c] Now, we must prove to you the facts and establish this careless act of the defendant or the lack of care of the defendant, by a preponderance of the evidence, as we go through this case. Now that merely means the weight of the evidence like you have the scales of justice, one just outweighs the other, why, that's what we mean by the preponderance of evidence.

First of all, this happened over in Sebewaing, Michigan.

Now, you wonder what we are doing over here in this court in another county and it is best explained to you by saying that the plaintiff, although he was empowered by the Probate Court of Huron County, where Sebewaing is located, brings this action in Saginaw County because this is the home office of the defendant or the resident agent is here in Saginaw County.

Now, the Michigan Sugar Company operates a, the defendant in this case, operates a plant at Sebewaing, Michigan, and it is a plant that deals with sugar beets and the processing of sugar beets.

The farmers in the area grow sugar beets and they are brought to the defendant's plant.

Now, the defendant in maintaining this plant, brings the sugar beets into the plant, and then he has got a waste product and the method is that he dumps it out into, through pipes, into ponds and into canals that goes up into the Bay and out into the lake. However, during the winter [fol. 97d] months, because of the frozen condition, because of certain requirements placed upon the defendant by law, he cannot discharge this waste material from his plant out into the Lake, as he has done, so he has gone to a great deal of expense and trouble of digging out huge ponds or just holes that he fills up with this material. Now there are several acres of it, I can't honestly tell you wheher it is 40 acres or 140 acres but somewhere in the evidence they will bring it out, and there are several ponds. Now, these ponds, when the sugar beet season is on, they fill up and they are collected there and then when the winter time is over in the spring, why, they drain these ponds out, what doesn't evaporate, into the Lake.

Now, when they maintain these ponds on their premises, they do not have a fence around the property or anything of that kind, and over the years this has developed into a great area for sportsmen to go duck hunting and to go trapping, and the company knows about it because they see men up there trapping and they see them up there hunting, they have the knowledge that people use this premises.

Now, with this knowledge the law has some requirements that they maintain their premises in a type of condition that at least won't entrap or endanger some human life.

Now, what happened in this particular case is that David Heider was 8 years of age at this time, it was on December 21, 1958. He with his brother James, we call him [fol. 97e] Jimmy, he was 11 years old, they had been for quite a period of time setting traps out near Sebewaing in various parts of the community.

Now, on this particular day it was exceedingly cold, it was 12 degrees below zero or approximately thereabouts, and these two boys went out on a Sunday afternoon, about 3 o'clock to set their traps. They were hunting for, trapping for I believe it was the muskrat, something to sell, to make a little money.

They never came back.

What happened is that late in the afternoon they were supposed to come back about 5 o'clock in the afternoon, they had promised, the 8 year old had gone over to the 11 year old boy's house, so I can explain the situation to you more clearly I had better explain this part further. There is an 11 year old boy, Jimmy Heider. Now, he is the son by the first marriage of Donald Heider and his first wife. Now, Mrs. Heider left and nobody knows her whereabouts, but the boy was raised by his grandparents and they had lived at the same house for about 2½ years, and then he, Donald Heider, got married and then he and his second wife had three more children, one of whom is David, the boy that we are suing for in this case.

Now, they just really didn't have the heart to take the boy away from his grandparents so the grandparents raised the oldest boy and the father and the second wife, they had [fol. 97f] their three children and raised them. Now, actually at the time of this occurrence they only lived approximately a block apart, they were like, and they were back and forth all the time in each other's homes.

On this Sunday the 8 year old went over to the home of his brother, it is really I suppose his half brother, he went over to his brother's house and they got some traps and they set out to trap. As I told you, they never came back at 5 o'clock.

So when they didn't return, the grandparents became alarmed and went looking for them, and were unable to find them, and subsequently they organized in the city of

Sebewaing a search party to try to find out what happened to the boys and after a period of time they found the boys' bicycle parked along the railroad tracks. This railroad track cuts through or bisects or divides the property of the, the defendant's property, Michigan Sugar property, somewhat in two, in that the plant and a couple of the ponds are on one side of the track and the rest of the ponds are on the other side of the track, and when they found the bike they traced their footsteps in the snow, and there was David, the 8 year old, James or Jim, the 11 year old, and their little dog, who was a cocker spaniel, I believe it was, and they followed the tracks and the tracks led up to the, onto the defendant's property, across one of the ponds, and this was December 21, 1958, in the afternoon, 12 degrees below zero.

[fol. 97g] The ponds were frozen solid but they walked across, at the area they walked across, they walked across like the center island and when they came back they didn't come back the same identical route they went over but instead they walked a different angle back.

They had their traps with them and they were looking for places to set the traps, what was a logical place, in a boy's mind, to set a trap for catching muskrats, and as they were walking across this pond in a different direction, they lost their life, and the way it came about was that the sugar company had a pipe which drains from the other ponds from the plant, dumping water into this pond, and this water has a chemical compound in it of such a nature that on the top of the water it forms like soap, it looks like, just like I suppose a lady taking a bubble bath, it just looks like a lot of soap, but in the winter time now, this soap gave the appearance of freezing. The substance, whatever it is, it gets cold and it gets hard, and it covers all of the water.

Now, the pipe away from the area where the water is coming in is frozen solid, it is frozen absolutely solid, but where the water comes in from the pipe into this area,

why, the movement of the water keeps it from freezing around there, it is like Niagara Falls keeps from freezing because there is so much water going over, no matter how cold it gets in this particular area around the intake pipe, or the outlet pipe, there is an area that was this (indicat-
[fol. 97h] ing) from the edge of that wall here across the room, that's open water. Now, that would be fine if these young boys could have seen open water, they wouldn't have gone over there, but as I explained to you, that on top of the water there rested this chemical snow, a soapy substance, and it built up to maybe 3 feet high, maybe 5 feet high, as I say, it was up, you can see it on the pictures up to the level of the boat. Anyway, the boy's tracks were walking down the solid ice and they stepped right into the foam or I call it foam, thinking it was frozen underneath, undoubtedly, and they stepped right in and they were drowned, the dog was drowned with them.

Now, this one boy, this older boy, had a life saving certificate, he could swim, the dog could swim, and they had some of the traps with them when the bodies were recovered, and one of two things happened. Either they drowned in the water or they got to the surface and they couldn't get over above the foam, the soapy, snowy substance, and they were suffocated and they were drowned.

Now, the position of the plaintiff in this lawsuit is that the defendant Michigan Sugar Company maintained, in other words, they kept on their premises a condition that they knew or in the exercise of just ordinary, plain, care should have known, that they had a dangerous condition, that they in fact had a trap, they had a misleading, deceptive condition.

[fol. 97i] They knew that there was solid ice, they knew the water came in and wasn't solid there, they knew this soapy or foamy substance was there and that it would appear hard or frozen and that it would, just by exercise of ordinary common sense, would know that the average person wouldn't be able to tell in walking down the pond

that there was a dangerous condition there, if somebody stepped on it they would have serious consequences.

They knew this and they maintained this condition. They had no signs saying danger, they had no warning of any kind, they had no fence, and yet over the years they let the public come upon their land, to hunt and trap.

There was no fishing in there because of the chemicals, there was no swimming in there because of the chemicals. The sugar plant only operates certain months of the year and that is after the farmers harvest the sugar beets, then they start in I guess in November, late November, starting in working the sugar beets over and working through the winter months.

Now, it is our position that the condition they had on their premises just in the exercise of care they knew it was dangerous, they knew that adults came on their land to hunt and trap and they knew that children did and they failed to give any warning or failed to protect the public.

Now, there is another question and that's of course, were the boys trespassers? Now, this really doesn't make [fol. 97j] any difference under the plaintiff's version of the law, whether they were trespassers or not, but it is our position that we don't know exactly what the boys were because that's a legal status.

In other words, whether they were invitees, licensees, or trespassers, we don't know. That's something that maybe you will have to decide if it becomes important as to what their status was, although I don't think it will be important at any time under the instructions that the Court gives you, I don't think it will be at all material to the case, yet I forewarn you so you can be on your lookout for the evidence when it comes from the lips of the witnesses on the witness stand.

I tell you these things in case it should be necessary for you to have to make a distinction because under the old law, as I call it, the old law, there was a distinction between trespassers, licensees, and invitees, and the distinction was what care you as a landowner owed—

Mr. Smith: If your Honor please, I don't want to interrupt my brother but I don't think this is material to the jury on an opening statement of what the facts are.

The Court: I would think you should confine yourself to what you intend to prove here. You may state your theory of the case but not an analysis of the history of the law.

Mr. Pillon: Well, the reason I was going to tell you that was because the witnesses will be testifying, as I ex-
[fol. 97k] plained, I don't think it is material.

Now, the other particular point that I wanted to bring to your attention is that, as explained to you about the case being one for the sugar company being careless, and they should respond in damages. Now, the next thing is, the damages for the young boy drowning, the type of nature of them which you are going to be hearing from the witness stand.

I think I should explain to you a little bit to you about them.

First of all, the damages that are allowable in a regular type of case is one for the cost of maintaining a child for the eight years that he was alive on this earth, the costs of his funeral, and the loss of the companionship.

Now I will tell you that there is an element of special damages in this case that we have pleaded that I want to bring to your attention so that when you hear the testimony here you can give weight to it if you desire.

Now, the testimony will show that the father Donald Heider has a premature life expectancy, he has had cancer and he has had an operation for it, and his life expectancy has a limit.

We therefore feel that James, the boy, if he had lived, would have contributed to the support of his mother, that is Mrs. Heider, during her widowhood, he would have con-
[fol. 97 l] tributed like any normal, well, he would have contributed like another son would help his mother who would be in need because she needed support.

We maintain that the boy if he had lived would have because of the father's premature life expectancy, would have contributed toward the support of his mother during her lifetime, if necessary, and during her widowhood, and would have contributed or helped with the raising of his younger brother and sister, he has a younger brother and sister.

Now, all these claims are joined together in one action because the law says that the administrator shall bring the action to recover under the wrongful death act.

Now, that is the gist of our claim, and the evidence is to be decided only from what is said from the witness stand. The remarks of my brother counsel and myself are just here as a guide to you.

It is your case, you are the triers of facts, as far as this case, the younger brother is concerned, David.

Now, any problems that arise or any questions you have, that come up, come to your mind, further, as we have already covered, if you raise your hand the judge might be of some help to you because you are entitled to know anything, as far as I am concerned, of any witness that is on the witness stand that was on the spot. Sometimes we can't remember everything, and if you get disturbed and find there is something that is troubling your mind, just raise your hand, we will be glad to help you out. We [fol. 97m] will all work together. We want you to know the facts, we want you to make a fair and impartial decision and render your judgment accordingly.

Thank you for your time.

In case I have forgotten to say anything, I will offer my pleadings as part of my opening statement, by incorporating them by reference thereto, so that I won't be taken advantage of by any technicality that I have overlooked.

Thank you very much.

The Court: Does defense counsel desire to make an opening statement at this time?

Mr. Smith: We do not, your Honor.

We will reserve our opening statement until the conclusion of the plaintiff's proofs.

The Court: All right.

We will recess until I think 1:30.

(Court adjourned at 12:10 o'clock p.m.)

[fol. 98]

IN THE CIRCUIT COURT OF SAGINAW COUNTY

Excerpts From Transcript of Testimony

(Consolidated cases)

HEIDER, HERBERT ADOLPH, was thereupon called as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

* * * * * * *

Mr. Pillon: At this time the plaintiff is offering into evidence proposed Exhibits 2, 3, 4, and 5, to which the defendant has no objection, as I understand it.

* * * * * * *

The Court: All right. There being no objection, they may be received in evidence.

Mr. Pillon: The Plaintiff's Exhibit No. 1 is a photograph of the scene taken the day after the occurrence and it is a black and white photograph of the scene, that is number 1.

The Court: December 22nd?

* * * * * * *

Direct examination.

By Mr. Pillon:

Q. Now witness, what is your name?

A. Herbert Adolph Heider.

* * * * * * *

Q. And where do you live at?
A. 326 Street, Sebewaing, Michigan.
Q. And about how far is Sebewaing, Michigan.
A. About 47 miles.
Q. Now, where do you work?
[fol. 99] A. The Chevrolet Parts division, Bay City.
Q. And how long have you been so employed?
A. 8 years.
Q. And how long have you lived at Sebewaing, Michigan?
A. Practically all my life, except 11 years that I lived in the City of Detroit.
Q. Now, who is James Heider?
A. That's Donald Heider's son by the first marriage.
Q. And what relationship is he to you?
A. Grandson.
Q. He is your grandson?
A. Yes, sir.
Q. Donald is your son and your grandson is James?
A. That's right.
Q. And who is David?
A. He's a grandson from the second marriage.
Q. Now, with whom did James live?
A. He lived with me and my wife.
Q. And how old was he on the day of his death?
A. About 12 and a half years.
Q. And when did he first come to live with you?
A. When he was 8 days old, I was appointed guardian of him.

* * * * * * *

Q. Did his father live with you?
A. Yes, he did, for two and a half years.
Q. So that the boy from the time he was 8 days old lived with you and your wife and your son, together, for the first two and a half years of his life?
A. That's right.
Q. And then what happened then in relation to your son?
A. Well, Donald is married again.

[fol. 100] Q. Donald got married again, is that it, and he went to live away from your house?

A. That's right.

Q. Did James, you call him Jim?

A. Yes.

Q. Did Jim continue to live with you?

A. Yes, he did.

Q. And in other words, he has lived continuously with you from the time he was 8 days old until the time of his death, is that correct?

A. Yes, sir.

Q. Now, the other boy, David, he did not live with you, is that right?

A. That's right.

Q. How far, where does your son live at, what street?

A. On Washington Street.

Q. And how far in distance is that from where you live?

A. Oh, approximately three blocks.

Q. Now, how did, what was your social life in relation to your son and his new wife and their children and you and your wife and Jimmy?

A. Well, we were together practically every day.

Q. Did they go to the same school?

A. Yes, sir.

Q. Did Jimmy go over to their house?

A. Yes, sir.

Q. David come over to your house?

A. Yes, sir.

Q. You were back and forth together practically every day is that right?

A. Yes, sir.

Q. Now, how old a man are you?

A. 54.

[fol. 101] Q. Now, you remember Sunday, December 21, 1958?

A. I do.

Q. And tell us what happened the first part of the afternoon in relation to the boys going trapping?

A. Well, Jim and David, they left about 3:30 on the—
Q. Did, and from whose house did they leave?
A. They left from my place.
Q. From your place?
A. Yes.
Q. In other words, David came over to your house?
A. That's right.
Q. And Jim and David left together?
A. That's right.
Q. Now, about what time did they leave your house?
A. About 3:30 in the afternoon.
Q. And what did they have with them, how were they dressed, describe it?
A. Well, they had on winter clothes and they had traps and a bicycle.

* * * * * * *

Q. Did they leave your house together?
A. Yes.
Q. And when they left, they had what with them?
A. Their bicycle and traps.
Q. Do you know whether or not the dog went along with them?
A. Yes, the dog went along.
Q. What kind of a dog was it?
A. Cocker spaniel.
Q. Cocker spaniel, and do you know how old David was?
A. He was 8 years old.
Q. Now, I want you to, ask you if you can identify these photographs for us and tell us who they are?
A. This is James (indicating).
[fol. 102] Q. This is James?
A. And this is David (indicating).
Q. I will offer in evidence these two photographs. Do you have any objection?

Mr. Smith: Could you ask a question or two about when they were taken and where?

Q. When were these pictures taken? Approximately, do you recall or know?

A. That fall in school.

Q. That fall. In other words—

A. At the beginning of the school term.

Q. In other words, along about September, is that it?

A. September or October, somewhere along in there.

Q. This had been taken within approximately 6 months of the time of their death, in any event?

A. Oh, about two months.

Q. About two months.

Mr. Smith: What is the number on the exhibits?

Mr. Pillon: The exhibits are number 15 is the older boy—

A. James.

Mr. Pillon: And number 16 is the younger boy David.

* * * * * * *

Mr. Pillon: I am offering them in evidence, your Honor.

The Court: All right. If there is no objection, they will be received.

Mr. Pillon: I will show the members of the jury here this Exhibit 15 and this is the oldest boy, is that right?

A. That's right.

Q. And he was approximately 12½ on that day?

A. That's right.

[fol. 103] Q. And this is the youngest boy, he was—

A. 8 years old a month before.

Q. A month before. He had just turned 8?

A. Yes, just turned 8.

Q. Now, what time did you expect that the boys would be back home that day?

A. When they left I told them to return at least about half past four and not later than a quarter to 5.

Q. Now, what happened when they didn't return?

A. Well, my son was ready to leave for Detroit and he wanted an early supper and they didn't show up by a quar-

ter to 5 so my wife took a drive down to Bayshore Park to look for them.

Q. Down to Bay Shore Park to look for them?

A. Yes.

Q. Now, you didn't go with them?

A. No, not that trip.

Q. And she came back, did she have the boys with her?

A. No, sir.

Q. What did you do next?

A. Then my son and my wife went out looking for them.

Q. And they came back?

A. They came back.

Q. Without the boys?

A. No, without the boys.

Mr. Smith: If I may interrupt you, I wonder if you could indicate whether this is the son who was the administrator or whether it was some other son. What son was that?

A. That was Herb, Junior.

* * * * * * *

Q. He was working in Detroit and he was up visiting, is that it?

A. That's right.

* * * * * * *

[fol. 104] Q. Then what happened then, what did you do next?

A. Well, I got dressed up and me and my wife went out.

Q. Where did you and your wife go then?

A. We went out to the Sugar factory channel.

Q. To the what?

A. The Sugar factory channel on Bay Shore park, what they call it.

Q. * * * I want you to take this blackboard here. Now, you say you and your wife went to the sugar factory channel, is that what you call it?

A. Bay Shore Park and channel, they are both down there.

Q. Put your house up in the corner of the blackboard, put it way out of the way.

A. Well—

Q. Put it right where it belongs.

A. Well, I would say to put it down here (indicating).

Q. Now, what route did you take from the house?

A. I went down on this street, to Miller Street, • • •

• • • • • • •

Q. So you went there on street over to Miller Street and then you went from Miller Street to where?

A. To Bay Shore Park.

Q. Where is Bay Shore Park?

A. That's it right there (indicating).

Q. And what is Bay Shore Park?

• • • • • • •

Q. That's the ME. Church Assembly Grounds, and what did you do when you got there?

A. Well, the road continues on from there, there's a road going in here to the park and a road goes on down to the [fol. 105] end here and that would be straight north and then it turns west and goes out to the channel.

Q. I see. Is this the channel you are referring to that you went to?

A. Yes.

Q. You call that the sugar factory channel?

A. That's what it was known by.

Q. And what did you do when you got there?

A. Parked the car here, the channel goes out further and this here is all public parking ground around here, I parked the car here, my wife sat in the car and she had the lights shining out into the Bay, and this here is where the Bay starts all the way around through here.

• • • • • • •

Q. That's Saginaw Bay, that's connected with what lake?

• • • • • • •

Q. Lake Huron, I see, and while your wife sat in the car with the lights on what did you do?

A. I got the flashlight and I walked out to the end of the channel where the Bay starts here, walked out there and I walked all around on the ice looking for them.

Q. And did you find them?

A. No, sir.

Q. Then what did you next do?

A. Then I came back in and we called up Mr. Tredup.

Q. Who is Mr. Tredup?

A. He's the marshal of Sebewaing and also deputy sheriff.

• • • • • • • • •

A. Mr. Tredup called the Huron County patrol.

Q. Was that the sheriff's office?

A. Yes, sir.

[fol. 106] Q. And then what happened?

A. And then Mr. Tredup called in different men from the fire department and friends, and told them to take their cars and drive out on the Bay along the shore to see whether they could locate the boys.

• • • • • • • •

Q. And then what happened when you got all of these, tell us what happened? When did the search party go over, what happened then?

A. Well, we waited and then a deputy sheriff came from Bad Axe, and—

• • • • • • • •

Q. Then what happened?

A. Then Charlie says, "Well, I'll stick around and see whether them boys come in with any reports or so," and "you and this here deputy go out and see whether you can find anything," and then, he said, "We'll be out." Well, in the meantime, though, I had called other friends and told them about it, and they also came out and started looking all around for them.

Q. What you did was organized a big search party for the boys?

A. That's right.

Q. Did you go with the deputies back around by the sugar pond area?

A. I did.

Q. All right, and do you recall approximately what time it was?

A. Oh, it must have been about 7:30, between 7:30 and 8 o'clock.

Q. What did you and this deputy do?

A. Well, we walked out onto the Bay again.

Q. Now, you drove back down the same area?

[fol. 107] A. We drove back down the same area.

Q. And you parked by the same place and got out and started walking, is that it?

A. Well then we went over into, well they got what they call their settling ponds in here, so we went over to this here first one—

. . . . . .

Q. . . . What did you, what did you then do?

A. Well, we walked across this first pond and followed these here tracks.

Q. What kind of a track were they?

A. Bicycle tracks.

Q. Bicycle tracks.

A. Out to the Bay, they went out to the Bay and at the Bay they ended, the ice and snow, there was no snow on the ice and that's where we couldn't locate any more bicycle tracks.

Q. No snow on the bicycle tracks. All right.

A. Well, we circled around and came back and walked all around the pond there and looked for some more, the tracks were criss crossing an it was snowing a little bit—and covered up the tracks.

Q. Now, this first pond, did it have any water in it?

A. No, it was all ice.

Q. How deep is that first pond, I mean, from the bank down to the bottom, would you estimate?

A. The slope of the bank?

Q. Yes, how far was it down?

A. Well, I couldn't give just the, probably about five feet.

Q. Well, and it was ice in there, is that the idea?

A. That's right.

Q. Was there any water?

[fol. 108] A. Well on the average it would be about six inches of water in there.

Q. Maybe 6 inches of water. It was down rather low that pond?

A. Yes.

Q. Then what did you do and the officer do?

A. Well, we came back up over there where we had our car parked and then this friend of mine, he came back, he had been upon these here dikes here looking around in this here vicinity for them, and he came back down here and he says he couldn't see a thing.

Q. He couldn't see a thing?

A. Right, and then the son said, Jim Kunisch, if you want the name, he says, "I know of another spot where they may have went," so this here deputy sheriff says, "Well, you and your dad," there were two boys, there were four of them in the car—

Q. There was four Kunisch's in the car?

A. Two Kunisch's, well three Kunisch's, their dad and the two boys.

Q. And anybody else?

A. And Kenneth? and they drove back out down back Bay Shore Park and down Pine Street to the railroad track.

Q. Now, did you subsequently that night see those men again, any of them?

A. Mr. Kunisch and I?

Q. Yes.

A. Yes, I was with them.

Q. Now, what caused you to go with them?

A. Well, they came, Schwikert, not Schwikert, the deputy sheriff, says, "We'll scout around a little bit more,"

so then we went out this way around toward the end of the cut and around in there a little bit and pretty soon Mr. Kunisch came racing back down and said, "We found the bicycle."

[fol. 109] Q. Where was the bike at?

A. Oh, it was down the railroad track I should say roughly 300 feet.

Q. From where, • • •?

A. From Pine Street • • •.

Q. In other words, the bicycle was down the railroad track about 300 feet, along a pole along the railroad track, was that it?

A. Telephone pole.

Q. Now, what happened when you got there to the bicycle?

A. Well, when we got there, • • • we followed the tracks there with the deputy sheriff.

Q. In other words, you and the deputy sheriff and the Kunisch boy and—

A. Mr. Kunisch,—Prevy—Prevy.

Q. And who else?

A. Oh, by that time there were other cars down there.

Q. And did you follow the boys' prints and the dog's prints?

A. Yes.

Q. With a flashlight?

A. Yes.

Q. Where did they go?

A. They went up here where they had their bike, they went back up in the railroad track, then follow the railroad track down here, why, I should say about approximately a half a mile.

Q. Then what happened?

A. Then the tracks led across down a ditch and up onto the first settling pond.

Q. Well, now, you talk about ditches. The ditches are ones that run along parallel to the railroad track?

A. That's right.

• • • • • • •

[fol. 110] Q. Well, does the railroad separate any of the settling ponds of the Michigan Sugar Company from the factory?

A. Yes. Yes, it does.

Q. So in relation to the factory the railroad runs between the factory and some of the settling ponds?

A. That's right.

Q. Well, then you said you went up on the bank of one of the ponds, is that it?

A. Yes.

Q. Now, do you have any idea how wide the bank is across, was there a ridge or road or anything up there?

A. Why, you can drive up on top of the bank, yes.

Q. • • • When you came up off across the railroad track off the railroad track, there is a little ditch by the railroad track, you go up on the bank there, there is a railroad?

A. Yes.

Q. And just beyond this road is a pond?

A. That's right.

Q. Now, what did you do then?

A. Well, we followed the tracks down into the pond.

• • • • • • •

A. Which is a drop of about, oh, 9 feet, somewhere along there.

Q. Do you know how deep the pond was?

A. No, I couldn't say.

• • • • • • •

A. The tracks led right straight across the pond over onto the other bank.

• • • • • • •

A. Well, we went up over that and down into the pond and followed the tracks over onto the other side.

[fol. 111] Q. What do you mean, the other side?

A. The other side of the pond, there's a roadway up on there, too, there's other ponds connect on to that.

Q. Now—did the tracks go up into an island in the center or did they go all the way across the whole pond?

A. They went over onto the other side.

Q. Yes, and then where did they go?

A. Then they followed the edge of the pond, they went up on the dirt bank here and followed over here a little ways where there was a bed of weeds, and you could see that they poked along with a stick there to see whether the ice was solid or not.

Q. You don't know why they poked with a stick, do you? All you could see is some evidence of weeds being stirred?

A. Oh well, he always carried a stick when he went.

Q. He had a stick with him that day?

A. Yes, sir.

Q. When he left your house?

A. Yes.

Q. And then what happened?

A. Then the tracks went up on the bank and went up here, oh, I should judge about 75 feet, and they came back down into the pond then.

Q. Back down into the pond. Now, how many men would you say walked across that pond with you that night the same place the boys walked across here, I mean going right across there and back, how many—

A. At one time?

Q. Yes, would you say it was?

A. Well, it was the deputy, I, and Mr. Kunisch, Kenneth Prevy and his two sons, and the some more came behind me but all of us walked over at the same time.

[fol. 112] And the ice was strong enough to hold all of you?

A. Yes, sir.

Q. What was the temperature out, do you know?

A. Well, around about that time it was about 8 below, it got colder later on.

• • • • • • •

Q. 8 degrees below zero, and what time was that, about?

A. Oh, that was around about between 9 and 9:30.

• • • • • • •

Q. Tell me what you did next?

A. Well, the boys came, walked back up on the bank again, and they came back over to the same spot where they had crossed the first time.

Q. Yes.

A. Then their tracks angled off here in that direction (indicating).

Q. They angled off at a—

A. Oh, about 45 degrees.

Q. Well, in other words, their tracks went sort of a northwest, coming back, that would be coming back facing east, but instead they went north and east, is that it?

A. More to the northeast.

Q. More towards the northeast. Now, it was more than a 45 degree angle?

A. Yes.

• • • • • • •

Q. And where did the tracks end in relation to, what did you see where the tracks ended?

A. Well, there was a bunch of foam up there, looked like frozen foam.

• • • • • • •

[fol. 113] A. That's where the tracks ended.

Q. Now, did the area that you were walking on, the pond, did it have that frozen snow like appearance on it?

A. Yes.

Q. Now, how do you know the tracks went that way, what did you see?

A. The tracks of the two boys and the dog, they walked there and we went up, well, also we could see where the tracks ended there, it was just that foam and that was the end of them.

• • • • • • •

Q. Now, what happened then? What did you do then?

A. Well, we all turned around and went back and I think Mr. Tredup called them up to get some grappling hooks and I left and I went back home then after that.

* * * * * * *

Q. * * * When did you go back there, sir?

A. The following morning.

Q. The following morning, and had they got, which boy had they got out before you went back?

A. They got James out first.

Q. That was the younger boy?

A. That was the oldest boy.

Q. * * * Jimmy or James, they got him out first, and you weren't there when they got him out?

A. No.

Q. Well, did you go back the next day?

A. Yes.

* * * * * * *

Q. And were you present when they brought Dave up?

A. No, I had went back home, * * *

* * * * * * *

[fol. 114] Q. And did you pay any part of the funeral expense?

A. I did.

* * * * * * *

Q. Is this statement from the funeral home?

A. Yes.

Q. That is the Plaintiff's proposed Exhibit No. 7.

Mr. Smith: These are I take it for both boys?

Mr. Pillon: For both boys.

Mr. Smith: We have no objection to it as an exhibit which shows that certain funeral expenses were paid.

Mr. Pillon: I offer it in evidence.

The Court: All right. It will be received without objection. What is the number of it?

Mr. Pillon: 7, this is Plaintiff's Exhibit No. 5. • • •

Q. Now, how much was the funeral bill for, how much did the funeral cost for James?

A. $648.65.

Q. And how much of a funeral cost for David?

A. Same thing.

Q. Now, did that include the price of the graves?

A. No, sir.

Q. How much did the graves cost for the boys?

A. I had the plot.

Q. How much did it cost?

• • • • • • •

A. Oh, I paid for it a long time ago, 37.50.

• • • • • • •

Q. Now, did you put markers up on each one of these?

A. I did.

Q. How much did the markers cost?

A. I haven't got that, I don't know, around, rough guess, I don't know, I think it was 42.50 apiece, I am not sure.

[fol. 115] Q. Did you have any other expense in connection with the funeral other than the expense of the, what you have told us?

A. I had to put the footings in for the markers.

Q. How much was that?

A. I done it myself.

Q. In relation to the funeral of these two boys, there were no other expenses involved?

A. No.

Q. Now, I want to show you in Plaintiff's proposed Exhibit No. 9 and just ask you if you can identify that (handing exhibit to witness) without showing it to the jury? Can you identify that, just what it is?

A. I can identify it, it is one of the sugar company ponds.

Q. What is it a picture of, without describing it, is that a picture of the scene as it existed that night?

A. That's right.

Q. It shows the men working out there that night to get the boys out of the water, is that it?

A. That's true.

Q. Now, the settling, this is a settling pond?

A. That's what they call them.

Q. What they call them, the pond was under the control and ownership of the defendant Michigan Sugar Company, is that right?

A. That's right.

Q. Do you have any idea how deep the water was in it?

A. Oh, around 7 feet.

Q. About 7 feet. • • •

• • • • • • •

Q. Now let's go back into another thing. I just want to get a point clarified before I go into the question of [fol. 116] damages. You said that there was like three holes, is that it?

A. No, I just said that that was the end.

Q. That was the end right there. How far is that from the bank, would you say?

• • • • • • •

A. Well, it would be in the neighborhood of 75 to 100 feet.

Q. Now, what was immediately, do you know what, do you know whether or not there is a water overflow pipe or an intake pipe there?

A. Yes.

Q. There is, and does it come under the railroad track?

A. It does.

Q. And does it empty into this pond, too?

A. It does.

Q. Now, is there a pond over on this side (indicating)?

A. Yes, sir.

Q. There are ponds over here (indicating)?

A. Yes.

Q. And now how far from the top of the embankment of the roadway is the opening for the water pipe?

A. Oh, I'd say around 4 feet.

Q. Around 4 feet, so this water pipe is about 4 feet from down from the top of—

A. Well, that would be from the top of the railroad.

Q. From the top of the bank it is about 4 feet down?

A. Oh, it might be more than that because that is from the railroad bank, about 4 feet, and you have dirt piled up on top.

Q. Well, on the night in question, could you see the pipe or couldn't you or did you or didn't you?

A. No, I didn't see.

[fol. 117] Q. Was the area around in front of it, describe the area in front of the intake pipe?

A. Well, I couldn't do that because we was walking with flashlights, all I can say, where the track ended, that was about 3 feet of foam up there where the tracks ended. I didn't see myself, personally, I didn't see it.

Q. You didn't see the rest of this out here, is that the idea?

A. That's right.

Q. Well, over here when you were walking along the pond this side, there wasn't foam over there, was there (indicating)?

A. No, there was solid ice.

Q. There was solid ice, where the tracks ended was the first time you saw the foam, is that it?

A. That's right.

• • • • • • •

[fol. 124] Q. Tell me in relation to the school, how did he do in school?

A. Like any average boy.

Q. I believe you have here the last report card for—what is the date of it—

A. I have Jim's here in my pocket. I haven't the last one but I have one of them (handing). That was '57, isn't it, '56-'57.

Q. '56-'57. I think for whatever it is worth I am going to offer it in evidence and have it marked, to show what type of boy he was.

[fol. 125] Mr. Smith: Why don't you read it in the record, you won't have to put it in.

Mr. Pillon: In the fourth quarter, memory work, A minus, Arithmetic A minus, Art B, Language C plus, History B plus, Nature Study, B minus, Handwriting C, Reading B minus, Spelling A minus, Effort was a plus mark or a check mark.

Attitude and conduct, Effort, check mark.

Courtesy, check mark.

Self control, plus mark. A plus mark is what they are.

Desk work plus mark.

Neatness at work, plus mark.

Cooperation with teacher plus mark.

With pupils plus mark.

Conduct in classroom plus mark.

On playground plus mark.

Respect for property plus mark.

Church attendance, it has got 618, I don't know what that means, and it shows he was promoted, and this is for the fifth grade, the year 1956-57.

By Mr. Pillon:

Q. What about school as far as athletics was concerned, was he on any athletic teams of any kind or nature?

A. He belonged to the baseball team, basketball team.

Q. Is he in this picture (handing to witness) there?

A. No, David is.

Q. Is he in that picture over there?

A. Yes.

Q. These are other pictures of him?

A. Yes.

Q. Now, he was on the Little League, was he a Little Leaguer?

A. Yes, sir.

[fol. 126] Q. And what did he do in baseball?

A. Pardon?

Q. What position was he on in baseball?

A. Pitcher and catcher.

Q. Pitcher and catcher. And did he have, you say you bought him a gun, did you let him have his own gun?

A. Yes.

Q. Did he go hunting with the guns?

A. Yes.

Q. Did you go along with him?

A. I did, and my wife.

Q. And did he ever shoot his own gun?

A. Yes.

Q. You have a picture here. Was this the first pheasant he ever shot?

A. That's the morning I took him out, the first that they went.

Q. The first day he went hunting. This was in 1958?

A. '58.

Q. The opening of pheasant season, so he went out and shot his own pheasant?

A. That's right.

• • • • • • •

[fol. 131] Re-cross examination.

By Mr. Smith:

Q. How long have you lived in Sebewaing, Mr. Heider?

A. Practically all my life.

• • • • • • •

Q. The sugar factory is located on the north side of a street that runs east and west in Sebewaing, does it not?

A. Yes.

Q. And that is the street that you have written down here as Pine Street?

A. That's right.

Q. You have indicated that there is a park of some kind to the west on the sugar plant's property?

A. Right.

Q. What is the name of that place?

A. Well, they always call it Bay Shore Park, it goes under the name of the Methodist Assembly.

[fol. 132] Q. How far to the west of the sugar company's factory, the factory building, would you say it is?

A. To that park? Oh, about a quarter of a mile.

Q. And it is at the road that runs into that park where you go out to the Bay or to the edge of the Michigan Sugar Company's property, is it not?

A. That's right.

Q. And what was the name of that road?

A. North Miller.

Q. How far to the west of the railroad track is the North Miller Road?

A. Oh, about five, six hundred feet.

Q. North Miller Road then would be straight east of and five to six hundred feet west of the railroad track?

A. Right.

Q. And does Miller Road then turn north?

A. That I couldn't say, that's the end of the road there, and then to the left is where you go out to the intake, the sugar factory intake there, and whether they got a road to that I don't know.

Q. How far to the north of Pine Street is the first of the ponds that you have referred to that were built by the Michigan Sugar Company?

• • • • • • •

A. Well, I'd say 1500, 1800 feet.

Q. Does the road end there?

A. Yes.

Q. And what is at the end of that road, to the north?

A. There's another road leading out to the Bay.

Q. That road turns to the west?

A. Right.

Q. How far is it to the west from the end of Miller Road to the Bay Shore?

A. About 300 feet.

[fol. 133] Q. What is the nature of the land there, in there, between the west of the Miller Road and the Bay Shore?

. . . . . .

A. Well, there's cuts there where the dirt was thrown out and where they go in and out with the boats in the channel.

Q. It is mostly marsh, marshland, isn't it?

A. Well, I imagine it would be.

Q. Between Miller Road and the Bay, I am talking about?

A. No.

Q. Well, what is it?

A. It's land.

Q. There are no houses in there, are there?

A. No, sir.

Q. And it isn't farming land?

A. No. Well, there are a couple of, there's garages built on the other side of Miller Road and there's also a home down just before you get into the park.

Q. Yes, before you get into the park but I am talking about the north end of Miller Road.

A. Well, that's all—

Q. And the Bay itself.

A. That's all land there.

Q. And it is grown up to sawgrass mostly, isn't it?

A. Well, marsh grass.

Q. Marsh grass, cattails, and that is so for a distance of well at least a mile, isn't it, to the north? Along the Bay Shore?

A. From where?

Q. From the north end of Miller Road.

A. How far to Bay Shore or to—what are you talking about, the Bay?

Q. Talking about the—

A. At the Bay?

[fol. 134] Q. Yes.

A. Well, as I said it is about 300 feet out to the Bay.

Q. Yes, but then when you get out to the Bay, to the area that is to the north of this road that leads out to the Bay, you have nothing to the north of that for a mile or two except this marsh grass and cattails?

A. That's right.

Q. Now, when you get to the end of Miller Road to the north, what do you encounter at that point, if you don't turn to the left and go out to the Bay?

A. Well, their property, the Bay Shore Property, goes beyond that low place, where you turn out to go to the Bay.

Q. How far does it go beyond that?

A. Oh, probably a couple hundred of feet.

Q. And when you get to the end of that couple of hundred of feet, what is next?

A. That's where the settling pond starts.

Q. Now, you said that on the night that you, the evening, when you went to look for the boys, you first went to the Park area?

A. Right.

Q. And after you left your car at the park area, you went out to the bay—

A. Right.

Q. How did you happen to do that?

A. Well, I walked out the channel and out to the bay, I thought maybe they drove out on the ice and something happened that one of them fell off the bike or something, broke a leg, and they wasn't going to leave one another lay there, and stayed there thinking there would be help out there for them.

Q. That's where you went to look for them first?

A. Yes.

[fol. 135] Q. Now, when you came back to your car, where did you next go? Did you go to look for them some more or did you go to report the fact that they were lost?

A. No, I went back and reported that they were lost.

Q. Then when you came back after making the report, did you park your car at the same place you had parked it be ore in this park area?

A. Well, I was with the deputy sheriff then, we parked there in practically the same place.

Q. You came in his car?

A. Yes.

Q. Then where did you go to look?

A. Well, we went out looking, there is a road goes around on the bottom by the settling pond, we went out through that direction, looking.

Q. That's what I am getting at now. There is a settling pond, you call it, which has a dike around it north of the end of Miller Road?

A. Right.

Q. And you have indicated that that must be about 200 feet because it is past the end of the park proper?

A. It goes out to the intake, yes.

Q. Now, is that a clay bank or an earthen bank, the dike that makes the pond?

A. Yes.

Q. We are talking about. How big an area is that pond?

A. Well, I couldn't say, maybe 3 acres, 5 acres, anywhere in that neighborhood.

Q. Well, to be brief about it, you didn't find the boys when you went around the first pond?

A. We didn't go around the first pond, we went out into the Bay first, followed the bicycle tracks.

Q. Well, was it when you came back with the deputy sheriff that you found the bicycle tracks or was it before?

[fol. 136] A. No, it was when we came back with the deputy.

Q. I see. So that it was on the occasion of your second trip out here that you first found the bicycle tracks?

A. That's right.

Q. Those bicycle tracks you have said led out to the Bay?

A. There was some led out to the Bay and some led up

on top of the first pond there, or the last pond, whatever they call it.

Q. It was the first pond inside of the sugar company's property?

A. Yes, right next to the Bay Shore.

Q. How great a distance—strike that. The direction that the bicycle tracks took from the park area where you first found it, led in a northwesterly direction out to the Bay Shore, did they not?

A. Right.

Q. For how far a distance out onto the shore did they run?

A. Well, we could just track the bicycle tracks up until what you call Saginaw Bay, we got there on the ice and there was no snow and we couldn't track them any further.

Q. Tell me what that distance would be, your best estimate of it, I mean, you didn't have a tape measure with you.

A. Oh, 100 feet.

Q. Then did you find another set of tracks coming back?

A. Yes, we circled around, came back and came back inside of the pond.

Q. Did you see bicycle tracks on the dike area around the first pond?

A. Yes. You would see them and then you wouldn't see them because the snow was blowing and covering them up. [fol. 137] Q. How far inside of the sugar company property did they run? I am talking now about the tracks that went out—

A. Well, it was out close to Saginaw Bay.

Q. They again led out to Saginaw Bay?

A. Well, that last pond there opens up into Saginaw Bay.

Q. Did you find tracks leading back then? Toward the Park area?

A. Well, I seen them leading back, I had the same tracks as we seen the time before and like I say, the snow is blowing and it was covering them up, we couldn't trace them in there.

Q. How many sets of tracks were there?

A. Oh, could have been half a dozen or better.

Q. When you came back then, I believe you said at the suggestion of the deputy, you went back to Pine Grove, and into the railroad track?

A. No.

Q. What did you say about that?

A. Mr. Kunisch and his two sons and that Prevy they were up driving around on the dikes and looking way down at the other end and when they came back they said they didn't see anything and this here Jim Kunisch says, "I think I know of a place where they might have went," and he told, the deputy told Mr. Kunisch to go with his son and see whether they could find anything and we'd take another walk, out onto the Bay, which we did.

Q. Well, it was at the suggestion of Mr. Kunisch then that somebody started to look along the railroad track.

A. That's right, his son.

Q. Now talking about what you know about it, where did you discover the bicycle?

A. I didn't discover it, Mr. Kunisch discovered it.

[fol. 138] Q. Did you see it?

A. Yes.

Q. Where was it when you saw it?

A. It was down the railroad track about 300 feet or better.

Q. Were there bicycle tracks from Pine Street along the railroad to the place where you found the bicycle?

A. After Mr. Kunisch told us that they found the bicycle, we didn't look for no tracks.

Q. If you will just answer my question, please, sir. I will ask that be stricken as not responsive.

The Court: I think it may stand, he is trying to tell us.

Q. Yes, and I want him to answer my questions.

The Court: Yes.

Q. As I ask them. Did you see tracks leading from Pine Street along the railroad track to the point where you saw the bicycle?

A. Well, sir, it was too dark at the time to trace any tracks at that time.

Q. Then your answer is no, I didn't see it.

A. No.

Q. All right.

A. I wasn't looking for them.

Q. Now, when did you see these tracks that went beyond where the bicycle was and along the railroad track to the northeast?

A. Well, Mr. Kunisch was down there first.

Q. When did you see them?

A. When Mr. Kunisch took us down.

Q. And was that the same night?

A. The same night, yes. He came back and got us and the deputy from the pond where we was first, and then the deputy stopped at the car and took our lanterns and then we started down that way.

[fol. 139] Q. And how far from the place where you saw the bicycle, was it to the northeast that the tracks you have told us about went off of the railroad?

A. How far from Pine or from where the bicycle was?

Q. Either way?

A. Oh, from Pine it would be down about three-quarters of a mile.

Q. And was that at about the point opposite and southeast of the pond where the boys' bodies were later found?

A. That's right.

Q. These tracks turned off. How wide is that railroad track?

• • • • • • •

A. The railroad right-of-way itself 25 feet or more, I couldn't say.

Q. To get to this pond from the railroad track, do you have to go up over a dike?

A. Right.

Q. Do you first have to go down into a ditch alongside of the railroad track?

A. Yes, it's off the railroad track down the ditch and up onto the pond or the dike.

Q. Then to go, take it step by step, the tracks that you saw led first down into a ditch and to the northwest off of the track itself?

A. That's right.

Q. And then to the edge of the dike?

A. Right.

Q. How high from the ground level of the railroad right-of-way, would you say it would be to the top of the dike?

A. The best of my estimation I would say around 70 feet.

[fol. 140] Q. What would be the width of this dike?

A. Oh, 15, 20 foot width on top.

Q. Then after you get across to the northwest, across the top of the dike, there is an incline down to the water level of the pond, is there not?

A. Right.

Q. And that's a gradual incline, is it?

A. Yes.

Q. And what would you say would be the length of it, as you came down from the top of the dike to the water's edge, and I am talking now as it was that night or the succeeding day?

A. Around about 10 feet down, 9, 10 feet.

Q. I think you said that you were familiar with the place where the intake pipe ran across the road, the railroad, into the pond where the boys were found?

* * * * * * *

Q. How far to the northeast of the place where the boys' tracks led off of the railroad to the northwest and up onto the dike was this intake pipe located?

* * * * * * *

A. I couldn't say, maybe 25, 30 feet, I wouldn't know.

Q. I want your best estimate.

A. Yes.

Q. Then the boys' tracks led all the way across this pond

to the northwest, or did it lead to a kind of an island area in the pond?

A. Well, it went to the north side of the dike.

Q. All the way across?

A. Yes.

Q. To the dike. On the northwest?

A. Yes.

Q. And what would that distance be, do you think? Your best judgment?

[fol. 141] A. Oh, 100 feet, 75 to 100, I couldn't just say exactly.

Q. Did you say 85?

A. 75 to 100.

Q. 85 feet, and did that 75 or 100 feet take you right to the dike on the northwest side of the pond?

A. Yes, sir.

Q. The tracks then you have indicated swung to the northeast, is that correct?

• • • • • • •

A. I would say north, northeast, somewhere along in there.

Q. North to northeast. Now let me ask you this. Did it go along the edge of the dike? Did the tracks go along the edge of the dike?

A. No, they were up on the side of the dike, on the slope.

Q. Did they follow the dike itself around as they went northerly or northeasterly, whatever it was?

A. Yes.

Q. How great a distance did they go?

A. Around about 75 feet.

Q. And then I believe you said they came back?

A. Right.

Q. To the point where they joined with the tracks that had come off of the railroad, to the northwest?

A. Where they first crossed, yes.

Q. Then they went to the easterly again?

A. Right.

Q. And at a point about midway between the two tracks that you have found before?

A. Well, from the, they came back to the starting point where they came across.

[fol. 142] Q. Yes.

A. And then like that line goes, they went off.

Q. Then they split, the angle, went out to the east?

A. Yes, they didn't split. They were together.

Q. Yes, but I mean the tracks the boys made?

A. Yes.

Q. Now, how far out on the pond did you trace those tracks? The last ones you have told us about?

A. Well, just from where we went over and found their tracks, came back to that point there.

Q. From the starting point?

A. No.

Q. That you said where both tracks joined?

A. Oh, might have went about 10, 15 feet, and there was this frozen snow and then the foam and that's where the foam had parted and that's where the hole was.

Q. And what is this hole that you are telling me about?

A. Well, I imagine that's where the boys went down.

Q. Well, did you see a hole there?

A. We could just see the opening where they shone their lights onto it.

• • • • • • •

Q. What was the size of the opening?

• • • • • • •

A. About 3 feet.

Q. About 3 feet. And did this pile of foam lead all the way across to the easterly bank of the pond?

A. Well, sir, I didn't stay any longer. When I seen that, they says, "Well, that's where the boys are," I left. I didn't stay around to measure the foam or to go any further, I got out and went home.

• • • • • • •

[fol. 143] Q. Well, my question was, did the foam extend all the way to the easterly side of the pond right up to the dike?

The Court: You may answer if you know.

A. I didn't stay there to investigate.
Q. You don't know then?
A. No, sir.

Mr. Smith: I think that's all.

Redirect examination.

By Mr. Pillon:

Q. Mr. Heider, do you trap?
A. Pardon?
Q. Do you trap?
A. Do I trap?
Q. Yes.
A. No.
Q. Duck hunting?
A. Well, occasionally I went out with them on a Saturday. Like I say, I worked the afternoon shift from 3:30 until 12 o'clock at night so I didn't have much time to go out hunting.

[fol. 145] Redirect examination.

By Mr. Pillon:

Q. I wanted to ask a few more questions, witness. Have you ever been able to find out if there were any eye witnesses to this occurrence?

* * * * * * *

A. There were several.
Q. Were there any eye witnesses that saw the boys go through the ice?
A. No, sir.

The Court: As far as you know?

A. As far as I know.

Mr. Pillon: I have no further questions.

[fol. 146] TREDUP, CARL, was thereupon called as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

Q. What is your address?
A. Sebewaing, Michigan.
Q. To start out with, what is your name?
A. Carl Tredup.

• • • • • • •

[fol. 147] Q. What is your occupation?
A. Village marshal and deputy sheriff.
Q. You are village marshal and deputy sheriff where?
A. Sebewaing, Michigan.
Q. On December 21, 1958, were you notified that there were two boys missing?
A. Yes, sir.
Q. Now, going back to December 21, 1958, tell us what you did first after you were notified that the boys were missing?
A. Well, the first thing we did, why, I called several of the firemen to have them meet me at the fire hall and at the same time I asked those boys to call some of the rest of them, to get them together, as fast as we could. After we met there, I give, put two or three in a group and sent them out in different directions to where these boys might be.
Q. In other words, you organized a search party?
A. Yes.

• • • • • • •

Q. Were you in the search party that found the boys' bike?

A. No, I never left the fire hall.

Q. You never left the fire hall. Now, did you subsequently go to the scene where the boys had had this accident?

A. Yes.

Q. What is the first time that you went there?

• • • • • • •

A. Approximately 9:30 or 10 o'clock.

Q. Well, how many men were there engaged in trying to find the boys' bodies approximately?

A. Well, to start with, there couldn't too many of them work there at one time. They only had one boat to work on [fol. 148] it, and due to ice conditions, this was a limit. There was plenty of people standing there but actually searching with the equipment, about three in the boat, and two, or two on each bank and the boat, would go back and forth with ropes.

Q. I see. In other words, there was ice there?

A. Yes.

Q. And you were only able to get the one boat into the water?

A. At that time, that's right.

• • • • • • •

Q. So subsequently you got a second boat in to the water?

A. Yes, later on.

Q. How did you manage to do that?

A. Well, brought it in my truck.

Q. Were you able to, did you have to break the ice to put the boat in?

A. Yes, by getting into the boat and rocking it, the boat, to start with, the ice was weak enough, but merely the rocking action of the boat, it had a tendency to crack the ice.

Q. Did you bring in a telephone pole?

A. Yes. We used a pole to move the broken ice from one edge.

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Q. Tell us what you did with the pole?

A. I believe it was used by the water department, I am not sure, I didn't get it.

Q. What did you do with it out on the pond that night?

A. Well, we kept dragging with a single grapple hook.

Q. Were you present when any of the bodies were found?

[fol. 149] A. No.

Q. Was there any foamy substance on the surface?

A. Yes.

Q. About how high was it?

Mr. Smith: Just a second, your Honor. I understood that Mr. Tredup was not out at the scene of the accident until later—

The Court: Will you try and clarify this—so we get the picture here.

Mr. Pillon: I don't understand but I will try.

The Court: Well, he said first he stayed in the fire house and second, he wasn't there when they brought him up. Now, if you can establish when he was there all right.

Q. After the, you had been notified that the boys could have the, drowned out there, you said that you got the pole and the boat?

A. Yes.

Q. Did you go out to the scene then?

A. After the boat was on its way.

Q. On its way, and when you got there, what time was that that you first got out to the pond to the scene where this occurred?

A. Well, that I don't remember.

Q. Had the men already started working?

A. Yes.

Q. How long had they been working?

A. Possibly 20 minutes.

Q. Approximately 20 minutes. What did you observe about the scene, in other words, tell us what you saw?

A. Well, I observed that there was considerable foam on

both sides of the boat, possibly it came to the top of the boat.

Q. It came to the top of the boat?

[fol. 150] A. Yes, sir.

Q. And what else did you observe or say?

A. I observed tracks.

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Q. Did you go back to the scene the next day?

A. Yes.

Q. Were you present when the second boy was found?

A. Yes.

Q. Can you describe his condition? Was it the older boy or the younger boy that—

A. The younger boy.

Q. The younger boy. Would that be David Heider?

A. That's right.

Q. And tell us what you observed about him?

A. The second day we had a different grapple.

Q. A grapple, what is a grapple?

A. It's a device with numerous hooks fastened to an iron pipe like a chain, small chain, we would let it to down to the bottom, we dragged that back and forth from either bank by poles. The first thing we hooked up was the dog.

Q. The dog, and—and do you recall what time that was, about?

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A. Oh, that must have been around 10:30.

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Q. And then you say subsequently, your grappling hooks got the second boy, is that it, David?

A. Yes.

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Mr. Smith: There is no question about it. If it is not admitted, it is now stipulated that the boys drowned in the pond.

* * * * * * *

[fol. 151] Cross examination.

By Mr. Smith:

Q. How long have you lived in Sebewaing, Mr. Tredup?
A. About 40 years.
Q. How long have you been marshal in the village?
A. About 20.
Q. Is that a full time job with you?
A. Yes.
Q. You didn't go out to the scene of the accident until some time after you first received the notice that they, that the boys were missing, as I understand it? Is that correct?
A. Yes.
Q. And when you arrived at the scene of the accident, other people were already there, were there not?
A. That's right.
Q. There had been a boat put into the water?
A. Yes.
Q. The ice had been broken and was in pieces in the pond, is that right, just as you said?
A. Yes.

. . . . . .

Q. And there was some foam on top of the water or on top of the ice, wherever you saw it?
A. That's right.
Q. Where was the foam, if you can give us some description of where it was?
A. Right near a pipe that had water running out.
Q. You could see this pipe with the water running out of it, could you?
A. Gosh, I don't remember now.
Q. You went back the next day, Mr. Tredup?
[fol. 152] A. Yes.
Q. Did you see the water running out of the pipe the next day?
A. Yes.

Q. Now let's see if we can be a little helpful to the jury about where this pipe was. There's a railroad track that runs on the bias down through this property, isn't there?

A. That's right.

Q. And it runs in approximately a northeast and a southwest direction, does it not?

A. Right.

Q. The place where the pipe is located that you are talking about is a considerable distance in from the street that crosses the railroad track down on the south side of the Michigan Sugar Company property, is it not?

A. Yes.

Q. What would be your estimate as to the distance from the street along the railroad track northeast to the point where that pipe was located?

A. Oh, approximately 1200 feet.

Q. Pretty close to a quarter of a mile?

A. Yes.

Q. At that—strike it out. Are you familiar with this property in here?

A. Yes.

Q. At the point where the pipe crosses the railroad track, it goes down under, does it not?

A. Yes.

Q. And it is run across the track about at a right angle to the track itself?

A. Yes.

Q. Now, what is there on the southeast side of the track, if you remember?

[fol. 153] A. Well, right next to the railroad track there is a shoulder and then there is a ditch.

Q. The ditch is to the south? Well, as a matter of fact, there is a ditch on both sides here of the railroad track, is there not?

A. Yes.

Q. Isn't there another big pond on the southeast side of the railroad track right across from the one where the boys were?

A. Yes.

Q. And is that up higher, is that a higher bank on the southeast side than the one on the northwest, if you know?

A. I don't know.

Q. Then you do know that the pipe that we have talked about here runs under the track and empties into the pond on the northwest side?

A. Yes.

Q. Now when you got out there the next morning, you could see that there was water running out of this pipe, could you not?

A. Yes.

Q. And it was running into the pond?

A. That's right.

Q. That was perfectly visible to you, you didn't have any trouble seeing it, did you?

A. No.

Q. When it ran into the pond at the edge it made a foam, or did it?

A. The next day the foam wasn't nearly as high as it was the day before.

Q. But was it still there?

A. There was some there yet, yes.

Q. And it looked just like foam, didn't it?

[fol. 154] A. Yes.

Q. It didn't look like ice to you, did it?

A. No.

Q. It looked just like foamy soap suds?

A. It was foam.

Mr. Smith: That's why it looked like foam. That's all, Mr. Tredup.

Redirect examination.

By Mr. Pillon:

Q. You say that this was about approximately 3 feet high. Now, how much of an area would you say it was, how much of an area did it cover?

A. The first night—

Q. Give us an example say in relation to the room here?

A. When I observed it the foam was up approximately two feet in depth.

Q. How large an area?

A. It was probably 6 or 8 feet wide and 10 to 12 feet long.

Q. In other words, an area of 6 to 8 feet by 10 feet, and in relation to the ice and snow, and the foam, what appearances does that foam give you?

A. Well, it was, you could tell it was foam, as far as that goes, but as you got closer to it, the ice got a little bit thinner, the further away from the pipe you got the thicker—

Q. Was the foam frozen?

A. Partially.

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Q. What did, what would you say it resembled or looked like in relation to the surrounding pond?

[fol. 155] A. Well, it looked like ice, up to the time you got up to where the foam was, then it was, naturally it was foam.

Q. The foam itself, you are saying, if I understand you right—maybe I don't—that is what I am trying to find out. The foam itself looked like ice or didn't look like ice?

A. No, I can't say that. It was on the edges of it, the extreme edge, partially frozen but it still looked like foam, the whole thing, of course it was hard to tell, it looks a little deceiving at night.

Mr. Pillon: All right. I have no further questions.

Recross examination.

By Mr. Smith:

Q. Well, so we would be clear about it, Mr. Tredup, you saw near the ice an open area that had foam and that was about 10 feet one way and 8 feet the other, is that true?

A. Approximately.

Q. The balance of the pond was frozen over with ice?
A. That's right.
Q. Isn't that right, and I wondered, did you go out on the ice yourself?
A. Yes.
Q. Now, could you tell, could you see the foam as you stood on the ice?
A. Yes.
Q. Then you have no trouble telling where the ice merged into foam, did you?
A. No.
Q. You could see that?
A. Yes.
[fol. 156] Q. It was plain to you?
A. Right.

Mr. Smith: That's all.
Mr. Pillon: All right. I have no questions.

JAHR, RICHARD, was thereupon called as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

Q. What is your name?
A. Richard Jahr.
Q. And what is your address?
A. 823 Tenth Street, Sebewaing, Michigan.
Q. And by whom are you employed?
A. Michigan Sugar Company, as of now.

Mr. Smith: Would you give me your address, please?

A. 823 Tenth Street, Sebewaing, Michigan.

* * * * * * *

Q. You are familiar with these ponds?

A. Quite.

Q. Do you conduct any activity on these ponds?

A. Well, I've trapped them, being within that area I would say for at least 20 years.

Q. What do you trap for?

A. Muskrat and mink.

Q. Muskrat and mink, and how many traps do you set out in this same—

A. Well, anywheres from 10 to 100.

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Q. Did you ever have, do you have permission from the company to trap on their land?

A. At one time when Mr. Kundringer was superintendent, he gave me the right to trap there.

[fol. 157] Q. How long ago was that?

A. Well, that's approximately three, four years ago.

Q. And since that time have you had permission from anybody to trap on that land?

A. Well, I asked Mr. Buchman, Mr. Trogan, Mr. Linworth.

Q. Well, did they give you permission or didn't they?

A. They actually did not give me permission, he says in his own words, for all of them they would like to get rid of the muskrats because they do damage on the ponds, but if I went onto them I was on my own risk.

Q. Now, have you ever seen any evidence while you are trapping that other people trapped up there?

Mr. Smith: Just a second, your Honor. I object to that because it calls for his conclusion.

The Court: He asked if he saw anybody. I think—

Mr. Pillon: I asked if he saw any evidence, if he saw any evidence of anybody?

The Court: I think he may answer that question.

Q. Have you seen—

A. Yes, I seen others out there trap.

Q. How many people do you know of that trap out there?

A. Three that I know of.

Q. Now, you weren't present at all—let me ask you this —have you ever, do you ever hunt up there?

A. Maybe one or twice in a season, around the edges of it but never in—

Q. Have you ever seen other people out there hunting?

A. Well, I've seen them, yes, around there—

Q. In what?

A. Around the area.

Q. Now, you weren't present the night of this search at all, were you?

[fol. 158] A. I was working at my job.

Q. You were working at your job, at the sugar plant?

A. Yes.

Q. The next day did you go out to any of your traps?

A. I went, when I heard about the tragedy, I went, I had three traps set, two just over the bank where the pipe comes out to empty into the pond, on the east side, and I had one across to the east, further across the railroad track.

Q. What did you see?

A. I saw small boys' footprints in, they had walked to my traps but did not disturb any of them, and those are the only ones that I looked at there.

Q. Was there any, did you have anything in the traps?

A. No, not at the time.

Q. Now, you say you are familiar with these ponds over here, the ponds on the east side of the track are higher than the ones on the west side?

A. Yes.

Q. Now, Mr. Smith, the attorney, asked, the pipe that goes in these ponds comes under the railroad track, is that right?

A. Right.

Q. And into this pond?

A. Right.

Q. But when it gets on the other side of the railroad track the outlet comes up in the air?

A. Right, at an angle up to the bank and then through the bank.

Q. At an angle up to the bank near the top and then through?

A. Through.

Q. About how far from the top?

[fol. 159] A. Well, oh, 4 or 5 feet, approximately. Every year they bank it up more or somewheres there at 4 or 5 feet, I would say.

Q. 4 or 5 feet. Now, the water flows down under the railroad track, then up this way, is that right?

A. Yes.

* * * * * * *

Q. It is gravity?

A. It is gravity flow because the pond to the east is higher.

* * * * * * *

Q. All right. Now, how high was, do you know how high the water was in this pond No. 3 where the tragedy occurred in relation to the bank?

A. I couldn't say, I couldn't say.

Q. What goes into these ponds, do you know?

A. Well, it's all the water that is used and anything that is wrong with the water, it makes a full amount of oxygen, as far as I know.

Q. Well, can you explain why they just don't dump it out into the Bay?

A. As far as I know, the State won't allow it.

Q. Now, the land is not fenced, is it?

A. No.

Q. There's no sign up by the water flow pipe of any type informing of danger or anything of that kind, is there?

A. I couldn't say.

Q. Do you know where the channel is or what they call the Sugar Company channel down by Bayport Shores?

A. The intake channel?

Q. The intake channel.

A. Yes.

Q. That is dredged out to get water from Saginaw Bay, is that right?

[fol. 160] A. Right.

Q. And there's a, is there some pumping unit down there, that pumps the—

A. The pumps are placed in the factory, draws the water.

Q. That draws the water, and is there an open area down by the channel that's been fenced or enclosed?

A. It's fenced.

* * * * * * *

Q. It's been fenced. For a number of years it has been fenced?

A. As long as I can remember, it has been fenced, around.

Q. And that is an area where there is a, like a pond, or an open body of water up there that they have fenced, is that it?

A. Yes, it is concrete wall all the way around with a small, oh, I would say a 10 by 10 house on it, where a large pipe, perforated pipe which sucks the water in, it is screened around there and the wall is all fenced around.

Q. The wall is all fenced?

A. Yes.

Q. Do you know why there is foam on top of this water?

A. Well, to me a lime, a substance of lime and water will cause foam because of the movement of the water.

Q. Lime and water causes foam?

A. To my knowledge.

Mr. Pillon: I see.

Cross examination.

By Mr. Smith:

Q. How old are you, Mr. Jahr?

A. 46—47, sir.

[fol. 161] Q. You must have had a birthday recently?

A. Yes.

Q. How long have you lived in Sebewaing?

A. All my life, 47 years.

Q. And how long have you worked for the Michigan Sugar Company?

A. Well, approximately 6, 8 or 10 campaigns and then I went into the service and then I didn't start for them again until 1954.

Q. The sugar making business is a seasonal business, isnt' it?

A. Yes.

Q. The campaign starts about what time in the fall?

A. Oh, around maybe the last day or so in September or first of October, usually.

Q. And it runs until along about in February, usually?

A. Depending upon the season.

Q. But it is usually somewhere in January or February?

A. Yes.

Q. That the season is concluded. Now, what is the work that you do for the Michigan Sugar Company?

A. At the present I'm an evaporator.

Q. That is work you carry on inside the plant?

A. Yes.

Q. Does the evaporator take the water out of the sugar and turn it into what we find on the table?

A. That's right.

Q. You apparently have been a trapper for some years, have you?

A. Right, sir.

Q. And when you wanted to trap on the Michigan Sugar Company property, you asked somebody about it, apparently?

[fol. 162] A. Right.

Q. And who was it that you asked?

* * * * * * *

A. Mr. Kundinger.

Q. And who is Mr. Kundinger?

A. He was superintendent of the Sebewaing plant at the time.

• • • • • • •

Q. Mr. Kundinger apparently gave you permission, is that right?

A. Yes.

Q. And about when was that, what year, about? Six, seven years ago or more?

A. Yes, I'd say, approximately.

Q. Then apparently you at a later time asked Mr. Buckley and Mr. Trogan?

A. Yes, and Mr. Lindsay.

Q. And Mr. Lindsey. Now, about how long ago was that?

A. Well, that was some time in the middle of November, I would say.

Q. Of this year?

A. Yes.

Q. You continued to trap out there after Mr. Kundinger had given you permission?

A. Yes

Q. How large an area is this Michigan Sugar Company property, Mr. Jahr? How many acres would you say there are in it, just to give us an idea?

A. Oh, I would say approximately somewheres in the neighborhood of 80 or 100 acres, maybe more, it's quite an area.

(Large aerial map marked Defendant's Exhibit No. 17.)

[fol. 163] Q. Mr. Jahr, I show you this picture which is marked Exhibit 17 for identification, and ask you if you recognize that as an air picture of the Michigan Sugar Company's property?

A. Yes, sir.

Q. And it shows the sugar company plant itself?

A. Yes, sir.

Q. Does it show the pond that is on the easterly side of the railroad track that you have been talking about?

A. Right here (indicating).

Q. You recognize then what you talked about as the lime pond?

A. This is the lime pond right here (indicating).

Q. Just tell me yes or no?

A. Yes, sir.

Q. Because this picture isn't in evidence yet, as we say. Do you see the railroad track shown on the picture?

A. Yes.

Q. Would you say that that is a reasonably accurate picture showing the area of the Sugar Company and the, some of the ponds, at least, that we have been talking about?

A. Yes, sir.

Q. I should ask you further, is that condition out there now the same as it was in 1958 when the boys were drowned?

A. No.

Q. Have any of the ponds been changed?

A. Well, they have rebanked them and—

Q. Yes, but have their locations been changed any?

A. No.

Q. The ponds then are just where they always were?

A. Yes, sir.

Q. Their size is the same, is it?

[fol. 164] A. I would say, yes.

Q. That is not very good English, are they? Well, while Mr. Pillon is looking at the picture, see if I can help the jury to get a little better idea about this area which you say is some 80 to 100 acres in size. First off, there is a road that runs east and west along the south side of the Michigan Sugar Company property, is there not?

A. Yes.

Q. And where does that road start from, to the east?

A. It starts off of the highway right at the Michigan Sugar Company office.

Q. And what is that highway, that you have said joins onto this east-west road?

A. 25.

Q. That is the road that goes up to is Pigeon and then on up to Bad Axe?

A. Yes.

Q. Bayport?

A. Bayport.

Q. Up in, goes around the Thumb?

A. Yes, sir.

. . . . . .

Q. What is the name of this road that runs to the west from M-25? Does it have a name?

A. Well, sir, as far as I know ever since I have been a child they just called it the Bay Shore Road.

Q. The Bay Shore Road. Well, let's we call it the Bay Shore Road. The Bay Shore Road runs to the west a ways and joins another road, does it not?

A. Yes.

Q. And what is that road?

A. If I'm not mistaken, it's Miller Road.

Q. And in what directions does Miller Road run?

[fol. 165] A. North and South.

Q. Does it go onto the south past Bay Shore Road?

A. Yes.

Q. This is Miller. How far north of Bay Shore Road does Miller Road run?

A. Well, there's a ditch that runs east and west along the Bay Shore Road and then, no doubt the Miller Road must discontinue right at the corner of the Bay Shore Road, as far as I know.

Q. Does the Miller Road, or does the ditch that you are talking about run right along Bay Shore Road?

A. Yes.

Q. It runs west then?

A. Yes.

Q. And how far out to the west does it run?

A. To the Bay.

Q. Bay is somewhere along out here to the west?

A. Yes.

Q. How far would you say that Bay Shore is from the intersection of Miller and Bay Shore Road?

A. The intake, sir?

Q. Well, how far is the Bay shore out?

A. The Bay shore, the water?

Q. That's right, the shore line.

A. The shore line. Well, with the high water, I would say approximately a quarter of a mile.

Q. That shore can change pretty quick and for quite a distance, can't it?

A. Yes.

Q. As the water goes up and down with the wind, but you think it is about a quarter of a mile?

A. Yes.

Q. In between Miller Road and the shore of the Bay is what kind of an area, what is in that quarter of a mile?

[fol. 166] A. Well, there's a cottage, and it's kind of a swale or wet in there and cattails, brush.

Q. That's in here between Miller Road and Bay shore?

A. Yes.

Q. How far to the north does that cattail and swale and marsh area run?

A. In which direction, sir?

Q. To the north.

A. To the north. From which point now?

Q. From the ditch—it runs out into the Bay from Bay Shore Road.

A. It runs, it is all in between the intake and the ditch that runs to the west, it is all cattails and marsh in there.

Q. Now, you have mentioned the intake. Where is the intake?

A. I would say that is on the corner of Miller Road, where you turn on Bay Shore Road.

Q. To the north?

A. The intake is approximately .3 to .4 of a mile.

Q. And is that an open ditch?

A. It's an open channel.

Q. How wide is the channel?

A. Approximately 40 feet, 40 to 50 feet.

Q. Is a foot one mark or two marks?

A. Inch is one.

Q. How long is that open channel?

A. To the shore line or—

Q. Start at the shore line and go east, how long is it?

A. The intake?

Q. Yes, sir.

A. Well, from the intake to the outlet on the bank, I would say it's approximately a quarter of a mile out there, you can walk onto the bank out onto the Bay, on the south [fol. 167] side. On the north side at the intake they have, so long as I remember, there's broken concrete blocks on there, and that doesn't run so far, on the north side.

Q. Well, what is the other end of this channel? We know that the one end of it is the Bay?

A. That's right.

Q. Where does it end as it goes inland, at the plant?

A. No. It ends where this, they have a large concrete oh, I would say it's approximately 40 by, it isn't that wide, approximately 40 by 40, concreted walls, with a perforated pipe in with a little house on it, approximately, oh, 8 by 10.

Q. That belongs to the Sugar Company?

A. Right.

• • • • • • •

Q. All right. Where does Miller Road end?

A. As far as I know it would end, Miller Road would end at the corner of Bay Shore Road where it turns off to the north.

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A. There's a small angling road that runs into the church property with a, they usually have a gate up there.

* * * * * * *

Q. There is then a road that is, that goes into some church property that you mentioned that is to the north of Bay Shore?

A. Right.

Q. And does the road end there at the church property?

A. No, sir; it goes through the church property, then turns to the west, to the intake.

Q. Does it lead right out to the intake?

A. Yes, sir.

[fol. 168] Q. Well, isn't there a point out here where the road ends at the edge of the Michigan Sugar Company property?

A. Where the road ends, it ends and then turns to the west.

Q. Yes.

A. To go down to the channel.

Q. Let's put it this way. Where that road runs, turns to the west, that is where the Michigan Sugar Company property begins?

A. Well, I wouldn't say for sure, sir, I don't know exactly where.

Q. But what I am getting at, is there a pond right there, where the road turns to the west?

A. There's a pond to the north, to the north, yes.

Q. Yes, to the north, and how far to the north from the spot where this road turns to the west is that pond?

A. How far to the north? I would say approximately not over 200 feet, across there, or more, to the north of the—

Q. That pond is dyked up, is it not?

A. Yes, sir.

Q. How high is the dike around that pond?

A. I would say approximately 12 feet, on the outside.

Q. That dike is 12 feet high?

A. I would say so, approximately, outside, 10 to 12 feet.

Q. Then the inside bank into the pond area itself, does that slope down?

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A. Well, they were sloped off toward the inside and also toward the outside.

Q. Was that a gradual grade down inside of the pond?

A. Yes.

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[fol. 169] Q. All right. Now to the north of that pond that you have just told us about is another pond, is there not?

A. Yes, sir.

Q. Incidentally I didn't ask you—what you, how big is that first pond, in area?

A. I would say approximately 10 acres.

Q. And is there another pond beyond that, to the north?

A. Yes, sir.

Q. And how big would you say that pond is?

A. Well, I would say approximately the same size as the other one.

Q. Is there still a third pond that lies in there to the north and east?

A. Yes, sir, toward east, next to the edge of the woods.

• • • • • • • •

Q. There is a pond to the north and west?

A. There's one to the north, one, two, three, ponds to the north of the Bay shore.

Q. Well, is the first of those ponds near the church property?

A. Yes, sir.

Q. And which one is that, as you have drawn it on the map?

A. Well, number 3.

The Court: Do you want to put a number on it, to help us out.

A. We, far as I recollect, number 3 is just, I know that number 3, this pond here and this one, are around the church property, if I am not mistaken I do not know exactly how much the sugar company's, where their line goes now or how much they—

Q. Well, there are no public highways in on the Michigan Sugar Company property, are there?

A. No, sir.

[fol. 170] Q. And whatever roads are in there, are on the dikes, is that right?

A. Yes, sir.

Q. And you go from the edge of the church property up onto the first of the ponds, up on the—

A. Yes.

Q. Am I right about that?

A. Yes, sir, the furthest one to the west, along the Bay line.

Q. Very well. And did you tell me what the approximate size of that pond was?

A. Approximately ten acres.

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Q. Then to the east of that and running over to the railroad is pond number 3, as you have drawn it on the diagram?

A. Yes, sir.

Q. What would you say the size of pond number 3 is?

A. Well, I would say that is a little larger.

Q. That is larger?

A. Yes, I would say.

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Q. I want your best judgment on it.

A. Well, I would say 20 acres.

Q. 20. Right? That lies east of the 10 acre pond and runs over to the railroad?

A. Yes, sir.

Q. Now, how high are the dikes around that pond?

A. Well, I would say approximately 12 feet.

Q. And there's a road that runs around from the drive around the top of that pond?

A. Around—they are all connected there.

Q. Now, what about the inside of pond number 3, is that a gradual slope, too, down to the water?

[fol. 171] A. Yes, sir.

Q. Then we talked about the lime pond, that was east of the railroad. You put that on the blackboard here, and you have indicated from the drawing that that lies about southeast and across the railroad from pond number 3?

A. Yes, sir.

Q. Is that a higher, is that higher up than pond number 3 or not?

A. Yes, sir.

Q. How high are those banks, the dikes?

A. I would say approximately on the outside from the ground level, 20 feet.

Q. 20 feet from the ground level. You said that pond number 3 was how much from the ground level, 10 or 12?

A. 12.

• • • • • • •

Q. So to get up on the, to get up across the dikes and into the pond areas you have got to follow the roads around the tops of the roads to get there?

A. Yes.

Q. Or else you have got to climb a 10 or 12 foot bank?

A. Yes, sir.

Q. On the east side of the highway or the railroad it would be 20 feet?

A. Yes, sir.

Q. That you would have to climb in order to get to the top—

A. Of the lime ponds.

Q. Of the lime ponds. There is a pipe that connects the two?

A. Yes, sir.

Q. I don't recall whether you said you had gone out to the area of the pipe between the two ponds, somewhere around the time this accident happened, did you?

[fol. 172] A. It was some time in the afternoon, sir, that I was out there.

Q. That would be on the 22nd?

A. Yes.

Q. The next day?

A. Yes, sir.

Q. Some time in the afternoon?

A. Yes, sir.

Q. Were there people around out there at that time?

A. There was no one, sir.

Q. You went out alone?

A. No, I had my nephew with me because they wanted to see the area where, there wasn't a soul around that I seen at the time.

Q. Did you get out of your car? Just a minute, I didn't ask you, how did you get out there, did you walk or drive?

A. No, sir, I drove there.

* * * * * * *

Q. And as you drive around on the banks to get there, taking into consideration the curves and what not, how great a distance do you travel before you get over to the place where that pipe is?

A. Oh, I would say approximately between a quarter and a half mile by the time you got around there, depending on which way you went, there would be two ways to go.

Q. But the shortest would be a quarter of a mile and the longest would be a half mile?

A. Yes.

Q. Where did you park your car?

A. Well, approximately pretty close to the pipe where the pipe run underneath the—

Q. That road runs, the top of the dike, runs around—

[fol. 173] A. North and south.

Q. And comes pretty close to the railroad itself?

A. Yes, sir.

Q. From your car, as you sat on the top of the dike, can you look down to the, could you look down into the pond area?

A. Yes, sir.

Q. And how far from the top of the dike was it down into the pond area, to the level of the water?

A. Oh, I would judge 6 to 8 feet, approximately.

Q. Could you see the water coming up from the pipe, coming up out of the pipe?

A. Running out of the pipe into the ponds, yes, sir.

Q. That's what—

A. I mean, yes, sir.

Q. You could see it as you sat there or stood there at the top of the dike itself?

A. Yes, sir.

Q. Was it making foam?

A. I would say not very much, if I remember right at the time.

Q. Did you trap that area in the fall of 1958?

A. Yes, sir, I'm quite sure.

Q. Have you ever seen young children in on this pond area in the winter when you were trapping?

A. On one occasion, sir, they had, from a distance I see where they had been to the north end of number 3 pond.

Q. Did you see the children there?

A. No, sir, I actually didn't at the time but I see where they were using it for, they were skating.

Q. Did you ever at any time in your operations in there as a trapper, see 10 or 8 or 12 year old children around in that pond area?

[fol. 174] A. No, sir, I didn't.

Q. Number 3?

A. No, sir.

Q. How many years did you trap?

A. Well, the Sugar Company area, I would say approximately 20 years I trapped around there, but the ponds and, the area has changed since then.

Q. In all that time you had never seen young children around the pond number 3?

A. Not as I remember.

Q. Mr. Jahr, you have seen no trespassing signs in there, haven't you?

A. Yes, sir.

Q. And when you wanted to trap in there you went to the owners of the property and asked them if you could go in and trap?

A. Yes, sir.

Mr. Smith: No further questions.

Redirect examination.

By Mr. Pillon:

Q. Mr. Jahr, how do you get up onto the road that takes you around here? Do you drive, you drive a car, don't you?

A. Do I drive?

Q. Do you drive a car to get up there?

A. Yes, sir. There's a road leading up to the, on the—

Q. There's a road. This road that you have got down here, you have it ending in here somewhere; the church property? How do you get your car from where you say the road ends?

A. You go through the church property.

[fol. 175] Q. Oh, you drive through it. The road doesn't end here then, does it? Is that it?

A. The road turns to the west.

Q. The road—

A. As it gets to the north far enough it turns to the west toward the channel.

Q. In other words, the road goes toward the church property and then the road cuts back this way, something in this fashion, is that about right?

A. Yes.

Q. It is sort of a zig-zaggy road?

A. Yes.

Q. The other road goes off in here and over to the church building, and church area?

A. Yes.

Q. The church, I call it the church building.

A. There's a fence to the west side of that road that goes through the church property.

Q. There is a fence right here, you mean?

A. To the west side.

Q. The fence, where, over here?

A. After you leave the Bay Shore road, running east and west, you turn to the north and then to the west of that north road or the north-south road going through—

Q. There is a fence—

A. There is a fence.

Q. All right, and then the fence just goes right along in here, is that it?

A. Yes, to the east.

Q. How far does it go? Anyway, there's a fence that goes along here, is that the idea?

A. Yes.

Q. Anyway, you go up here and there is Moore Road that goes down this way and this is part of Saginaw Bay in there, is that right?

[fol. 176] A. Yes, to the west.

Q. And in here is a big area of, you turn around there and there's something like a roadway here, isn't there?

A. Yes.

Q. This whole thing is just like a roadway, big roadway, all driven on.

A. Yes.

Q. Can you drive up this way, up the channel?

A. Part way, you can if you want to take a chance going along the bank where they dredged the bank and banked it up.

Q. You can drive up there a certain distance anyway?

A. Yes.

Q. Isn't it true that citizens from Sebewaing come out here and launch their boats in this channel?

A. Yes, sir.

• • • • • • •

Q. How long had you known of the public of Sebewaing launching boats out there?

A. As long as I can remember.

Q. As long as you can remember. Well, now, this is cemented right here, some area like is cemented right here, is that what you referred to before?

A. Yes.

Q. And there's water there, isn't there?

A. Yes, sir.

Q. The whole thing is water, isn't it?

A. Yes, sir.

Q. I don't know if this is there or not, but is there, is this where you are talking about there is a fence around this area?

[fol. 177] A. Yes, sir, where that little house is on and the perforated pipe where they draw the water in.

Q. You have got a little house in here with a perforated pipe?

A. And it is screened off below and also a fence around the top of the cement wall.

Q. I see, there is a fence right around the top of the cement wall, is that right?

A. Yes.

• • • • • • •

Q. What do I have to do to get up on the pond when I get over here?

A. Well, first of all there's a cable across there.

Q. Now, you mean—

A. Going up to the pond.

Q. Is there a pond over—

A. There are two posts here, yes, sir.

Q. And is there, you saw a cable?

A. There was, as far as I know, always.

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Q. If there are, you say there are two posts here, before you can drive up onto the roadway that goes around the dikes, is that it?

A. The bank, yes, sir.

Q. How long have those posts been there?

A. As far as I remember those posts were there when the dikes were first built.

Q. Now, how long ago did they start to build those dikes?

A. I do not recollect.

Q. This used to be all be just open marsh area and watery on this side of the railroad track, didn't it?

A. Yes.

Q. That was years ago?

[fol. 178] A. Years ago when the water was high, it was. If I recollect I, well, there was marsh in there, I trapped that area before the ponds were in.

Q. All right, you trapped in. Then the company has started in digging out these artificial, digging out dirt and throwing up the bank and making a pond, isn't that right? When did they start doing that, do you know?

A. I don't really remember, sir, when they started.

Q. O.K. Now, you say that, is there or isn't there a wire across here?

A. There is, sir.

Q. There is. Now, if the wire is up, is it possible or impossible to drive your car up onto the dike?

A. Impossible.

Q. Impossible. Now, do you know who is in charge of keeping that wire up or not?

A. Couldn't say, sir.

Q. Now, how, do you know whether or not the wire was up the night these, the day these boys were drowned?

A. I do not know, sir.

Q. Have you ever seen cars out there driving?

A. Yes, sir.

Q. How often?

Mr. Smith: Will you fix the time, please, sir?

Q. Well, all right. Say within the year 1958. How often would you see cars up there driving?

A. I wasn't out there that often, sir, to watch how many cars were driving around—

Q. You set traps up there in 1958, didn't you?

A. Yes.

Q. When did you set your traps up, for the season?

A. Yes, sir.

Q. When is the season?

A. Usually starts in December this year and if I am not mistaken, last year it was a week earlier.

[fol. 179] Q. Well, in 1958 when did it start, do you recall?

A. I do not recall, sir.

Q. Now, you say that in 1958 you saw some evidence—

Mr. Smith: Just a second, he didn't say any such statement.

Q. About 1958, as I remember, did you say that you—

The Court: Well, ask him what he said.

Q. What did you see in 1958 relative to children being in the area?

A. I did not say I had seen children, sir, their tracks.

Q. You saw tracks. What kind of tracks where they?

A. Small footprints.

Q. Small footprints. What ponds were they in?

A. They were around 3.

Q. Pond 3, and was there some, I believe you said that they had been ice skating, is that what you said or am I mistaken?

A. Not at that time, sir.

Q. Oh, I'm sorry. Now, was that before this tragedy happened?

A. I don't recall, sir.

Q. Now, you say you set some traps by the railroad track and this embankment, is that it?

A. Yes, sir.

Q. Is it down below on the low part, is that where you set the trap?

A. I set the traps on the east side.

Q. The east side of the railroad?

A. East side of the number 3 bank, dike, on the east side of the dike, toward the railroad track, just off from the bank where the pipe comes up, on the east side, two traps I had set there.

Q. Then you had one over on the other side?

A. The east side of the railroad track yet further to the east.

[fol. 180] Q. Over there. Now—how long is trapping season open?

A. If I am not mistaken, the first of February, sir, the 15th, all of January, sir, if I am not mistaken.

Q. Why did you trap in this area around the ponds?

A. Well, I would say, sir, there's a few extra dollars in it and I have done it all my life and I am just interested in it, more of a sportsman, more of a hobby.

Q. It is a good area to trap, is that it?

A. It always was, until a year or so now.

Q. About a year, since it has been any—

A. Since they've redug it and re-diked the banks and that.

Q. In other words, they redug the dikes out in the summer time, is that it?

A. Yes.

Q. And built the bank up higher?

A. Yes, sir.

Q. And since 1959 it hasn't been as good in the year '59 and '60 for trapping but before that time it was always a good trapping area?

A. Yes.

Q. Now, why is it a good trapping area, I mean, because it is near the water or what, I don't understand why?

A. Well, during the winter when it freezes up hard there's the water that's emptied in there, they must come in there, and it is open water and that's what they like about it, they are frozen out of their homes along the shore line and they got to get out somewheres.

Q. In other words, you believe that the animals are frozen off out here?

A. Yes, sir.

Q. And they come back into here because there's it where there is some open water, is that it?

[fol. 181] A. Open and running water.

Q. And that's right around the pipe, is that it? The overflow pipe?

A. Well, there's different parts where there is—

Q. Now, these ponds all connect up, don't they?

A. Yes.

Q. And number 4 pond, I am talking about number 4, it has got several openings, they open up and go up into the lake?

A. They can drain them from one into the other, they can drain them out into a ditch or—

Q. How old is your nephew?

A. Off hand, sir, he's in the marine corps, around 19, 20, sir.

* * * * * * *

Q. When you say that, a no trespassing sign, is that what you said?

A. Yes, sir.

Q. Do you know how often they are put up?

A. As far as I know they are pretty well kept up.

Q. Do you know what they look like, can you describe them?

A. Well, some are regular printed form, that comes from the, down from the printing office, with a cardboard of some kind and others are of wood, solid wood, and painted.

Q. Those solid wood and painted ones, they weren't up there before this tragedy, were they?

A. I don't recollect, sir.

Q. You don't recollect?

A. I don't remember.

Q. You know they are up there now, though?

Mr. Smith: Now just a second, your Honor. There is reversible error, I think, to bring that into the case. It is incompetent, it is immaterial.

[fol. 182] Mr. Pillon: You are the one that brought out that—

The Court: Well, you asked about them and he wants to know—

Mr. Pillon: I want to know if they were up there that day.

Mr. Smith: But I say, your Honor, that the question of the witness now is objectionable, it is incompetent and immaterial.

Mr. Pillon: I think it is very relevant.

The Court: Well, you brought in, Mr. Smith, about there being no trespassing signs and I think he is entitled to inquire as to when they were there. I think it's relevant, if you brought it out here in the first place.

The question may be answered, if you know.

By Mr. Pillon:

Q. The wooden signs you are talking about or the metal signs that are painted, were they up at the time of the tragedy?

A. I don't remember, sir.

Q. Are they up there now?

A. I've seen them, sir, yes.

Q. Now, the sign you are talking about, the printed sign, what size of sign, is it as big as that calendar behind you or half that size?

A. No, sir, I would say they're about 8 by, maybe 8 by 16, approximately.

Q. 8 inches by 16 inches?

A. Yes.

Q. What do they say on them?

A. Keep out, no trespassing.

Q. Now, where do they, where are those posted at?

A. As far as I know, all around the bank, all around the sugar company property.

[fol. 183] Q. Isn't it true that those signs were not up there—

Mr. Smith: Just a second. Here again is a leading question—

The Court: Sustain the objection to the form of the question.

Q. Were signs up, well first of all, how many trespassing, no trespassing signs would you say there are around pond number 3, at—

A. I don't remember, sir.

Q. You don't remember. How many do you remember were up, if any, on December the 21st, 1958?

A. I don't remember sir.

Q. You don't know in fact where there was any up there?

Mr. Smith: These are all leading questions.

The Court: The last question is objectionable in form.

Q. On December the 21st 1958, did you see any no trespassing signs?

A. I would say yes.

Q. Where?

A. Around the sugar company property.

Q. Do you know specifically where?

A. I can't exactly point it out, but—

Q. In relation to pond number 3, where was it?

A. Well, along the north, I'm quite sure along the north, on the north and east.

Q. Yes. I am talking about 1958, December 21, 1958?

A. I don't remember, sir.

Q. What, you are talking about, you are trying to tell me just now about the present day? Along the north and east?

A. No, sir.

Q. Well, then on December 21, 1958, which is two years ago, where were the no trespassing signs, if they were up?

[fol. 184] A. I wouldn't remember, sir, the exact spots.

Q. Do you know the, will you describe the condition of, can you remember any sign distinctly that you saw there in December 21, 1958?

A. I don't remember, sir.

Q. You don't remember. You don't remember seeing a single no trespassing sign around pond number 3 on December 21st or December 22nd of 1958?

A. At the time I went up on the pond I wasn't looking for signs or anything of that sort.

Q. Well, this is just a—now you had said that there was very little foam coming out of the pipe the next day, is that right?

A. If I remember right, sir.

• • • • • • • •

Q. • • • Will you please describe what you saw in front of this pipe in relation to pond number 3 on December 22, the next day, 1958?

A. If I remember right, the water was running, which it always is, and there was a small amount of foam.

Q. Well—

A. When I went out at the time, if I remember right, the dog was laying, that little dog was laying up onto the bank.

Q. The little dog was laying up on the bank. Do you know what time of the day it was that you were out there?

A. It was in the afternoon, some time.

Q. In the afternoon. You saw the dog laying up on the bank. Now, was the pond frozen except around the pipe or not?

A. Around the pipe it wasn't frozen. They had, the ice was, everything was broken up around there, where they had been in with the boats and—around the pipe it never freezes where the water moves at all times.

[fol. 185] Q. I understand.

A. You can always hear the water running there.

Q. All right. Now, what was the weather like on December 21, 1958, if you know?

A. Well, if I remember, sir, it was very cold.

Q. Do you know what the temperature was?

A. No, sir.

Q. How do you know when you set your traps, do you have, how do you know where you set your traps?

A. I have a memory, sir.

Q. Fine. Do you have them marked any way?

A. Yes, sir.

Q. Do you have a stick or a flag?

A. I have a stake, with a small piece of rag with a flag on it.

Q. Is that the customary way of marking those traps?

A. Yes, sir.

Q. Other trappers do the same thing?

A. Yes, sir.

Q. Do you have a particular color or cloth you use or not?

A. Well, it's a piece of rag, sir.

Q. When you have been up there you have seen other stakes with pieces of rag on it, haven't you?

A. Yes, sir.

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Recross examination.

By Mr. Smith:

Q. Let me ask you this. Do you have any trouble reading those no trespassing signs that you saw out around the ponds?

A. No, sir.

Q. And without remembering the particular posts on which any of them were nailed, would you say that those signs were around all of the ponds?

[fol. 186] A. Yes, sir.

Q. Would you say they were around there in 1958?

A. If I recall, sir, yes.

Q. Would you say they were there in 1957?

A. Yes, sir.

Mr. Smith: I think that's all.

Redirect examination.

By Mr. Pillon:

Q. Were the same ones that were up in '57, up in '58?

A. I don't know, sir, whether they were the same signs.

Q. They are cardboard signs, aren't they?

A. Some of them are.

Q. You never recall seeing any other sign up there in '58 except the cardboard signs, is that it?

A. I'm quite sure there was, sir, at the time, would have been faded.

Q. You don't know how faded they were, will you describe how faded they were?

A. I don't remember, sir.

Q. You didn't have permission to trap up there—

Mr. Smith: Here again is a leading question, your Honor, of this man's own witness and it is contrary to what he has already testified to.

Mr. Pillon: It isn't at all.

Mr. Smith: You are impeaching your own witness:

The Court: The question was leading. The Court sustains the objection. Go ahead. Do you have any other questions?

[fol. 187] Q. Did you or did you not have permission to trespass upon that property in 1958?

Mr. Smith: Just a second, sir. I object to this question, your Honor.

He has already testified that when he went in, he had permission, and this is an effort to impeach this man's own witness when he comes here to testify.

The Court: Well, I don't know. Haven't you covered this?

Mr. Pillon: He just made the remark that he did, that's why I want to bring out from this man, so we can ask these other men, they told him they wouldn't give him permission, he had to go at his own risk.

The Court: Well, all right.

A. This is the last year or so.

Q. When?

A. This last year here.

Q. This last year. Why did you go ask them for permission?

A. What is that?

Q. Why did you go ask them for permission?

A. Why? You don't trespass on other people's property.

Q. Well, did they give you permission?

A. Just like I said, sir, this past year, and Mr. Buckley and Mr. Trogan, Mr. Linden, and in their words, "Yes, I could trap on the property at my own risk."

Q. I see. In 1958 you didn't ask anybody for permission, did you?

A. I had permission, sir.

Q. I see. You are positive of that?

A. Yes.

Q. You are not mistaken about the conversation at all, are you, that you had?

A. No, sir.

Mr. Pillon: I have no further questions.

[fol. 188] Pitcher, Edward, Sr., was thereupon called as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

Q. Your name, sir?

A. Edward Pitcher, Sr.

Q. And what do you do over at Sebewaing?

A. Hunt ducks, mostly, now, I'm retired.

Q. Retired, and what do you do, what type of work did you do before you retired?

A. I was a commercial fisherman.

Q. Commercial fisherman. Where, I assume you had a boat, you had a fishing boat?

A. Yes, I got a boat.

Q. Where did you launch them at?

A. Oh, that has nothing to do with this deal, down the river.

Q. I know. I am just trying to get something. Did you take them out to the north channel?

A. No.

Q. Now, did you help in the search for the boys?

A. Yes, I'm fire chief, fire truck.

Q. You are the fire chief at Sebewaing?

A. Sebewaing.

Q. And you helped in searching for these boys?

A. I was called on the fire truck.

Q. Now, when did you first go out to pond number three where the boys were found?

A. Oh, I don't know. I didn't look at the time.

Q. Anyway, it was in the evening of December 21, 1958?

[fol. 189] A. I guess that's the right date, I never kept track.

Q. Were you there when they found the boys?

A. I was there when they pulled the first one out, or was carrying him up the bank.

Q. I see. Had you, were you in the first group that got there that commenced the search?

A. Not quite, no.

Q. Not quite. Were you the first, in the first group that got out there and tried to find the bodies?

A. Well, practically. I went home and changed clothes and I was a few minutes late, when I first was there.

Q. Were you there when the first boat was launched?

A. Yes. No, I was there when the second boat was launched. They had one in.

Q. Will you describe the condition that you found out there on pond number three at the time that you first got out there?

A. With regards to—

Q. Let me show you this plaintiff's proposed Exhibit No. 9, I beg your pardon—that's Exhibit No. 9.

Mr. Smith: I object to that, your Honor.

Mr. Pillon: We can argue over it later. Let him first identify it.

Q. Does this picture show the men working there at the time?

A. It wouldn't be early. It would be late, later.

Q. Would this be after they had recovered the first body?

A. I believe.

Q. You believe. Was it before they discovered the second body?

A. Yes, the next day they found the second boy.

Q. The next day you found the second boy. Is this a fair picture of the conditions existing at that time?

[fol. 190] A. Well, it's a little rougher than it was when the foam was higher, we shoveled that foam away and broke it up.

Q. In other words, this is more broken up than it was at the time when you first got there?

A. Yes.

. . . . . .

Q. You say that, describe this, describe what you found there in relation to the foam?

A. Well, it came out, the current come out from under and it kind of turned off, the foam was piled right up here, oh, I would say two feet high and gradually sloped off.

Q. The foam was piled up about 2 feet high and gradually sloped off?

A. Sloped off as it got away from there.

Q. And was there snow on the ground this day?

A. Oh, yes.

Q. And was there snow laying on top of the ice?

A. Yes, yes.

Q. And was there snow laying on top of the foam?

A. Well, yes, up until right—where it was forming.

Q. Up to right where it was forming, you mean, there was snow right up to where, where was that place?

A. Oh, it seemed to get, it got thicker as it went back, got deeper, the foam, and thinner as—in drifts in there,

it just don't get down there and stay down, the wind blows it in there and collects in there.

Q. I see. Now, did you see any evidence of where the boys had gone through?

A. Yes.

Q. Well, describe that to us.

A. I wasn't there when they got him out but I got in the boat and as soon as there were two guys in the boat, [fol. 191] working, and shoving, and they had pipes, feeling under, and the boy wasn't there, where they went down that's all I could see, I wasn't there when they first found him.

Q. You saw the hole there?

A. He says he just felt right in there with a pipe boom and pulled him out.

Q. Well, was that, where was that in relation to the two feet of snow you said, the two feet of foam covered with snow and it gradually tapered off or tapered off, where in that area was that foam?

A. Oh, we had the length of the boat in, possibly two lengths of the boat.

Q. Two lengths of the boat?

A. From where the water came out of the tile.

Q. Where the water came out of the tile, you mean the pipe?

A. The pipe.

Q. In other words, the hole was about two lengths of the boat, from where the water came out of the pipe. Now, about how far would that be?

A. Oh, possibly 15 foot boat, 25 or 30 feet.

Q. You would say about 25 to 30 feet?

A. Somewhere along in there, I wouldn't just measure it or—

Q. Now, was there, beyond that hole, any of the foamy substance that was covered by snow?

A. Oh, yes, there was, it got thinner as it went out.

Q. In other words, as you got further beyond the hole it was thinner.

A. It sloped off.

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[fol. 192] Q. Did you go back the next day?

A. Yes.

Q. You were present when the second body was found?

A. Yes.

Q. When either one of the bodies was found, was there any trapping, any equipment found with them?

A. I guess they did, they hooked out half a dozen traps out of the water and when they was—

Q. With the grappling hook they hooked out some traps?

A. They hooked out some traps, three or four, I don't know.

Mr. Pillon: This man will ask you some questions. Cross examine.

Cross examination.

By Mr. Smith:

Q. How long have you lived in Sebewaing, Mr. Pitcher?

A. 55, 60 years now.

Q. How long have you been with the fire department?

A. 25 or 30, I forget, off and on.

Q. You were a commercial fisherman, you say?

A. Yes.

Q. What time was it that you first heard about these boys on the dike there?

A. Oh, I would say 8:30 or a quarter to 9 or 9, somewhere along in there.

Q. Were you at home at the time?

A. No, I was in town, that is, I went home, I went to the fire hall and back and got into some clothes for that type of a job.

Q. And about what time did you get out to the Sugar Company property?

[fol. 193] A. I would say from 9:30 or 10, well I never kept track of the time.

Q. I understand that.

A. Somewhere along in there.

Q. You got out there after other people had arrived?

A. There had been a few, not too many, they just was putting boats in there.

Q. How many boats were in the water at the time you got there?

A. I helped put one in and they had one in ahead of me, I helped put the one in. The other one was laying there, had it on the truck.

Q. Well, were either of the boats in the water when you got there?

A. Yes, one of them was, just in.

Q. Just in.

A. Yes. That is, just had room enough I think for one.

Q. From which side of the pond were the boats launched?

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A. From the side that the road is on.

Q. And is that closest to the railroad track?

A. Yes. Right by the, right where the pipe runs in.

Q. Would that be on the easterly side of the pond?

A. Yes.

Q. Would you say that it was right where the pipe runs in to the pond?

A. Yes.

Q. And when you got there that night did you see the water pipe?

A. Saw the current running through, I didn't particularly look at the pipe.

Q. You could see the current running?

[fol. 194] A. Yes, I could see the open water.

Q. Where the water discharged into the pond you could see that?

A. Why yes.

Q. That was open water?

A. Right there.

Q. Now, where was this foam that you have told us about?

A. Well, the built up, just a little ways from the open water and had a sort of a little streak of open water and then it started to foam, it kind of built up until it got a couple of feet high and then it gradually sloped off a ways, right next to the heavy current was where the most of it was.

Q. The most of the foam, you say was right next to the heavy current?

A. Yes.

Q. Would that be right by the pipe?

A. Well, it would be 10, 15 feet out.

Q. When you say out, you mean toward the west and into the pond?

A. Yes, toward the channel.

Q. Now, you had no difficulty in recognizing that it was foam, did you?

A. Well, it looked like soap bubbles and stuff coming out there and the water was so cold, it froze.

Q. It looked like frozen soap bubbles?

A. Yes.

Q. Is that right?

A. As far as I could see, most of it.

Q. Yes. Now, how far to the northwest of this open water area was it that you saw the hole where the boys were, where you think they went in, anyway?

A. Well, I was thinking about 25 feet, along in there somewhere.

[fol. 195] Q. About 25 feet?

A. 25 or 30, I wouldn't just swear to it one way or another.

Q. And was there ice there?

A. Slush, foam.

Q. And was this same stuff that looked like soap bubbles there?

A. Yes, they broke in with the boat.

Q. You say the men had broken it with the boat, but it was this bubbly, soapy looking substance that was frozen, is that right, sir?

A. Right there, I think the channel was the softest.

Q. All this foam the same, didn't it, like soap bubbles?

A. Oh, as it got away it was covered with snow.

Q. Away in which direction?

A. Away from around the hole, the current.

Q. I am talking about around the hole itself.

A. From around where the current came out.

Q. I am talking about around the hole itself, it looked just like it was soap bubbles, didn't it?

A. Well, right there next to the water and after it got back a ways it looked like or snow on it, or slush, but of course I am used to that, I went through that stuff a lot of times, I knew what it was.

Mr. Smith: I think that's all.

Redirect examination.

By Mr. Pillon:

Q. When you arrived, the boat was in by the pipe where the water comes out, is that right?

A. Well, they pull it back and forth to change the guys in the boat, you see.

Q. Yes, and what they did, what did they do as they moved down into this foamy, snow-like substance?

A. Rock the boat, couldn't break it up that way, we shoveled that slush back, that foam, whatever you call it.

[fol. 196] Q. In other words, you rocked the boat to break it?

A. If we couldn't break it then we shoveled it, and broke it up. We would feel under it first with our poles to see if there was anybody there.

Q. In other words, you pushed your poles underneath it, these grappling hooks to see if there was anybody underneath?

A. To see if we could find anybody.

Q. I see, and this foamy substance that, it was white, wasn't it?

A. Mostly white.

Q. And you say there was snow mixed in it, or snow on top of it?

A. Snow on it and some mixed in, I suppose.

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Redirect examination (continued).

By Mr. Pillon:

Q. Now witness, you were there that night and then you were there again the next day, is that right?

A. Yes, sir.

Q. Did you see any signs posted at all around or near pond number three?

A. I didn't. I don't remember seeing them, I didn't really look for any.

Q. You say you are a commercial fisherman, retired commercial fiisherman?

A. Yes.

Q. Have you done any ice fishing?

A. Lots of it.

Q. In your experience you are familiar with ice then?

A. Oh, I guess if you would call it that, I have been in and out a lot.

Q. Well, how often would you go out on the ice in your days that you did your fishing?

[fol. 197] A. Gosh, I lived out there six weeks once and oh, I have been out there lots, I don't know how often.

Q. Have you been out there lots?

A. In 50 years there is quite a lot of it, to keep track of that.

Q. Now, how do you distinguish on ice a place where there is, I want to give you a hypothetical question, this hypothetical situation, it may be of some help here, where you have a hole in the ice, for instance, and say it is snow

or something is frozen over, how would you distinguish that from the solid ice when you were going out?

Mr. Smith: I think I object to that, your Honor. That isn't a question of expert testimony and it seems immaterial to the trial of this cause, I think.

The Court: How do you claim it is material?

Mr. Pillon: Well, the condition that existed in pond number three of having the frozen foam, or snow frozen over the water there as compared to the regular ice, I want to get some expert opinion or some knowledge of how you distinguish between it to see if it can be of some help to us as to what the characteristics are.

The Court: You are not asking for a comparison, though, are you? I don't care. I think you may answer.

A. Oh, we just use an ice pick, to feel it if we are not sure, and if you are not sure, well, take a chance sometimes, and sometimes you go in and sometimes you don't, that's about the only way and then you learn after you get old enough not to take any chances and you miss them, go around them, that's the way I learned, I guess.

Q. You learned by going into the water?

A. Well, yes, I broke through, some times.

Q. Would it be difficult or easy to distinguish, let me put it this way. Assuming that you had an area of solid [fol. 198] ice, and then you had an area of foam and over both the ice and the foam there was snow and that foam was frozen under, how would you distinguish that from the ice?

Mr. Smith: Again, your Honor, I think I should object to this because I don't think that it is of materiality to the case we have here in order to, I think it is a matter of expert opinion.

Mr. Pillon: Well, the basic problem—

Mr. Smith: As I understand, it is the plaintiff's position there was foam in the area. From that comes the conclusion that the boys mistook it for something else. That hasn't been established yet. How that ties in with an opin-

ion of experts, how you would distinguish foam from snow or ice, I can't see and I object to it.

The Court: You are asking about this particular case?

Mr. Pillon: Yes. I am asking about this particular case.

The thing I have in mind is that you have foam on, you have solid ice and then you have what would ordinarily be open water coming out over the top and on top of it is snow.

The Court: All right, let's—

Mr. Pillon: The temperature was several degrees below zero and I want to know how you distinguish it, we have got to figure out—

The Court: All right, let's see what the last was—do you wish to ask the question again or do you want her to read it?

Mr. Pillon: I will ask the same question again.

The Court: All right.

Q. Just assuming these facts: On the one hand, I have solid ice and next to it where there is open water over [fol. 199] the top I have foam like the foam that you saw, just the same foam you saw there that night, and over the ice and the foam there was some snow, and this foam is frozen. Now would it be easy or difficult to tell between the ice and the foam?

Mr. Smith: That again is what I object to, your Honor, because that's a question for the jury, the question for the person who sees it.

The Court: Well, he saw it and I don't know that that would be an expert question, really, I think he saw it and was there and he can testify if it was distinguishable or not.

I don't see any real objection to telling what he saw there.

I think you may answer. If you understand the question. If you don't—

A. Well, I would rather you would repeat it again, then I will get it.

Q. When you were out there that night and you saw some foam, the next day you saw this foam?

A. Yes.

Q. And you also saw the solid ice, on top of both was snow. Now, how would you tell where the, how would you, how would you distinguish and tell the difference between the two?

Mr. Smith: Same objection.
The Court: Overruled.

A. Well, when you look at it and from experience and you could see that it didn't look right, and the only way you could tell would be with a chisel, which we always used to carry. In the first place, that's the only place in the lake that has that kind of stuff, that foam. You don't get that out on the lake.

[fol. 200] Q. It would be difficult then if you weren't experienced to tell that?

A. Oh, I suppose so, yes.

Recross examination.

By Mr. Smith:

Q. I believe you testified this morning, Mr. Pitcher, that this foam was up some or several feet, you say?

A. About two feet, I thought.

Q. Above the regular surface of the—

A. Right where the water ran into it.

Q. The pipe?

A. Yes.

Q. So that there was a regular ridge of this?

A. No, it was higher right around the hole was the highest and just gradually sloped off to the ice, gradually.

Q. Now, it is a fact that it was a regular ridge of this foamy substance that tapered off back to the level surface?

A. Yes.

Q. Of the ice and it stood right up there. You had no trouble in seeing it?

A. No.

Q. As you said a little earlier, if you walk on it, you take a chance?

A. Why sure, from that side. The side I am talking about you went in from the bank side, just coming in from the other way, gradual slope, you better know your way or you are bound to get in.

Q. This was a gradual slope that went right up from the level surface?

A. Well—

Q. You say there was foam and there was snow, both? You could see both, is that correct, sir?

[fol. 201] A. Well, snow was hanging on top there.

Q. But you could see it was a foamy substance?

A. Sure, you could see it by looking at the stuff over beyond that.

Q. Could you see the open water over beyond this foam?

A. Not right by the other bank, you couldn't, no.

Q. When you got up to it, do you think you could?

A. I imagine so if you would stay up long enough.

Mr. Smith: I think that's all.

Redirect examination.

By Mr. Pillon:

* * * * * * *

Q. If you were on the bank opposite where the water comes in, that pipe where the water comes in, and you came down off that bank, and started walking toward where the water comes in, how close would you have to be before you could distinguish that there was water there?

A. You could hear it before you would have to see it.

Q. You would have to hear it before you could see it?

A. From the road, I would think.

Q. And when you got, do you know how high the level of the water was that day?

A. No, I don't, I was only there that day, that is the first I have been there in years, never been there before, not in—

Mr. Pillon: I have no further questions.

Recross examination.

By Mr. Smith:

Q. You stated, Mr. Pitcher, that you could hear the water before you could see it?

A. I think you—

[fol. 202] Q. How far away from this pipe could you hear the water?

A. Well, I never checked that myself, I don't know how far. Some guys got better ears than others.

Q. Yes, but you were talking about— .

A. Well, I said coming in from what I called the west, from the opposite side, well, you could hear it.

Q. You could hear it?

A. You could hear it, sure. You couldn't see it but you could hear it running through that tile out there, bubbling and running a pretty good gait there.

Q. As you approached from the west you could see this ridge that gradually rolls into the—

A. Oh, yes.

Q. Foam into the ice, is that right?

A. We didn't go in from that way, we went around.

Q. I understand you did but you were there and you have testified about it, you have had some opinions and I am now asking you if it isn't a fact that you could see this rise in ice?

A. Yes.

Q. Terminating in foam, and so forth, when you were on the bank, on the east bank or the west bank of the pond, couldn't you?

A. Yes.

Q. Would you just say yes or no.

A. Yes.

[fol. 203] TAYLOR, FLOYD, was thereupon called as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

Q. I am just taking him out of order. What is your name, sir?

A. Floyd Taylor.

Q. And where do you live?

A. Sebewaing, 730 Tenth Street.

Q. And what do you do?

A. As an occupation?

Q. Yes.

A. Truck driver.

Q. For whom?

A. Michigan Producers Dairy.

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Q. Do you have any children?

A. Three.

Q. And I didn't get your occupation?

A. Truck driver.

Q. As a truck driver for the Michigan—

A. Producers Dairy Company.

Q. At Sebewaing, thank you. And did you know James and David Heider?

A. Yes, I did.

Q. You knew both the boys?

A. Yes.

Q. Were you some kind of a coach?

A. I was a Little League coach at the time.

Q. You were the Little League coach at the time, and did you coach each one of these two boys?

A. Yes, I had them both.

[fol. 204] Q. And how long have you known the boys?

A. Well, personally just up until the time I had them

in the Little League, I knew the kids, not really know them until I had the Little League.

Q. Then you had them in the Little League, you got really acquainted with them?

A. Pretty well, yes.

Q. Now, as far as David is concerned, starting with him, he is the younger boy, we will start with him first, what kind of a boy was he, will you describe him to us?

A. Well, he was, well, I would say he was just a boy. I mean, he was active as far as the sports were concerned, he liked sports, he was a little bit more inclined to, not be so much as a go ahead child, I mean he was more or less would, well, I don't know maybe it was because he was younger because he kind of waited for the other fellows to go ahead with it, I mean then he would come in and join.

Q. Was he physically sound as far as you observed?

A. Oh, yes, yes, he was.

Q. How did his general health appear to you?

A. As far as I could see, he was just a healthy boy.

Q. Was there the nature of his disposition, was he an obedient child?

A. I had no trouble with him.

Q. Was he courteous and considerate?

A. Yes.

Q. Now, I want to ask you a few things about James, what kind of a boy was Jim?

A. Well, he was more aggressive, I mean he, to me he seemed like the kind of a kid that went into something with everything, I mean, when he was playing he just wasn't out there playing ball, he was playing to win all the time and he was just the aggressive type that would, a scrapper is what I called him.

[fol. 205] Q. Well, was he an obedient boy?

A. Yes, I had no trouble with him. He would do anything you asked him but he was the type that wanted to know why before he would do it, you know.

Q. Now let me ask you, you know where the settling ponds are for the Michigan Sugar plant, don't you?

A. Yes, I do.

Q. Did any of your children ever trap on that land?

Mr. Smith: Just a second, your Honor.

The Court: Do you have an objection, will you state it?

Mr. Smith: Yes, I was thinking of the question as a general one and I object to it unless something of the time and place is established and how he knows and what he knows.

The Court: Well, he is just starting. All right.

Q. We will try to look at it in reverse order. Did any of your children trap?

A. Yes.

Q. Which one of your children?

A. My oldest boy trapped.

Q. How old was he when he first started trapping, about?

A. 14, I think, was when he was trapping, 14 or 15 years.

Q. And for how long a period of time did he trap?

A. During the trapping season.

Q. I understand, during the trapping season, what I mean is how many years?

A. Well, just those two years, 14 and 15.

Q. About 14 and 15?

A. Yes.

Q. And what years was he 14 and 15, in other words, what is his age?

A. Well, he's 18 now.

[fol. 206] Q. He's 18 now. Now, so when he was 15 that would be three years ago, and 14 would be 4 years ago, approximately?

A. Yes.

Q. In other words, that would be '57 and '58, is that right?

A. That's right.

Q. Did he—pardon me, he said that should be '56 and '57, I said '57 and '58. When was your child 14 and when was he 15 and did he trap the season of '57 and '58 or '56 and '57?

A. Well, now, I don't know myself. You are getting me kind of confused here. I don't think it makes too much difference does it?

Q. You said it, it doesn't. Did your boy when he was 14 and 15 years old, did he trap upon these ponds of the Michigan Sugar?

A. Part of them, yes.

Mr. Pillon: Now this gentleman here wants to ask you some questions.

Cross examination.

By Mr. Smith:

Q. I am curious to know, Mr. Taylor, how you knew where your son had his traps?

A. Well, a lot of times I went around back there with him.

Q. You what?

A. At times I went around there with him.

Q. When he went on there so far as you know you went with him?

A. Not always, no, but I knew where his trap lines were.

Q. Well, where were his traps so far as you know?

[fol. 207] A. Well, he had traps more back of the Sugar Factory itself, he wasn't trapping on the pond in question at this time.

Q. Well, where was the, that you knew about, where were the traps that you knew about?

A. They were on the—

Q. North—

A. They would be on the opposite side of the railroad tracks.

Q. They were on the east side of the railroad tracks?

A. That's right, that's right.

Q. And they were just north of the factory itself?

A. Yes, more in that area there.

Q. Now, when you went on there with your son, did you see anybody around the Michigan Sugar Company? Any employees of the Michigan Sugar Company, as you recall?

A. Yes, we used to see the fellow that came around.

Q. No, I am asking when you were there at the traps, when you were putting your traps on, did you see anybody from the Michigan Sugar Company at the time you were placing the traps?

A. No, no, I can't say that I met any of them, you know, out there while we was actually there.

Q. That's what I mean, and did you ever talk to any of the employees of the Michigan Sugar Company about your trapping out there?

A. No.

Q. Did you ever tell any of the Michigan Sugar Company employees that you were trapping on their premises?

A. No.

Q. Then so far as you know, there wasn't anybody at the Michigan Sugar Company aware that you were ever on their premises for trapping, is that correct?

[fol. 208] A. Not as far as definitely getting any permission to go on it, no.

Q. Or ever seeing you when you were there? That's correct, is it not?

A. I suppose, and I think it is, we never ever, nobody ever came out and said, "Well, O.K., you can trap here," or anything like that. I mean, that actually come to us.

Q. What I am getting at is so far as you know nobody ever saw you on there that was an employee of the Michigan Sugar Company?

A. Well, I can't truthfully say that because all they had to do was see us but as far as I know I can't say.

Q. I am talking about what you know about it. My question is, so far as you know there was no employee of the Michigan Sugar Company who ever saw either you or your boys doing any trapping on their premises?

A. Not as far as I know.

Mr. Smith: I think that's all. By the way, was the older boy, that was James, was he not?

A. That's right.

Q. He was the more impulsive of the two, I gather from you—

A. He was, to me. Now, my impression of the boys, we had him, he seemed like more the leader type, more the go-ahead type.

Q. Had more push to him?

A. Yes, well, like I said, he was more scrappy.

Mr. Smith: All right. Thank you.

[fol. 209] Redirect examination.

By Mr. Pillon:

Q. How did you get onto that land when you wanted to set the traps, you and your boy?

A. Well, there was a number of ways. We just walked right across the highway and onto the land, as far as that goes, and then we walked around in behind the sugar factory and—

Q. How close could you come to the sugar factory?

A. Oh, we probably, at times within 100 yards of it.

Q. And there were ponds back where you were setting the traps, weren't there?

A. There were ponds, yes, there is a pond back there.

Q. And did you ever see any signs up saying no trapping?

A. I never saw any no trapping signs, no.

Q. Did you ever see any signs of warning of any danger?

A. No danger warning signs that I recall.

Q. Well, wasn't it common knowledge in the town that this was a good area for trapping?

Mr. Smith: Just a second, your Honor. I object to that.

Q. Let me withdraw the question and ask it this way. Do you know whether or not it was common knowledge

in the town as to whether this was a good area for trapping or not?

Mr. Smith: I object to that, your Honor.

Mr. Pillon: I think that it is proper to show that as far as the citizens of the community were concerned, this was an area that they trapped in or that they hunted in and that it was common knowledge in the town and I think I have a right to go in, to show that.

[fol. 210] The Court: Well, can you show that the defendant's agents had any knowledge of this?

Mr. Pillon: Well, I will, sure, I can show that and on Wednesday I have a man coming in to show it and if you will take the testimony subject to connecting it up, showing that they had men that knew this, in fact we had a witness this morning that trapped on there that said that he had seen other trappers out there and that he talked to the company about it. I have the reverse coming in, I have somebody from the company—

The Court: Well, all right. I will take the answer. If you know, if you can answer that. Do you recall the question?

A. If it was common knowledge that—

Q. This was a good area for trapping?

A. Yes, I think that just about everybody that did any trapping around town knew that that was one of the best areas around, to trap.

Mr. Pillon: I see. I have no further questions.

Recross examination.

By Mr. Smith:

Q. Did you ever see any no trespassing signs around on those premises in 1958 and before?

A. There has been, as far as I can recall, there has been no trespassing signs on that property for quite a few years.

Q. Now, you never did get around the area where these boys were in pond number 3, so-called, in the course of your expeditions out to the property, did you?

A. I have been back around that pond myself.

Q. Ever take your son back there?

A. Yes, a long time ago.

Q. He never went there alone?

[fol. 211] A. He wasn't supposed to, I don't know what he did when I wasn't there but he wasn't supposed to.

Q. How many times in 1958 were you on the Michigan Sugar premises trapping?

A. That is kind of a rough question to answer, I couldn't even begin to remember how many times I was on them.

Q. Give us some idea.

A. I would say probably I was back there at least 25, 30 times.

Q. And you would go in from the Rose Island road if I understood you?

A. No, we could go in from the M-25 side, went in around and crossed the Rose Island Road, and cross Rose Island Road and back to the Rose Island.

Q. The Rose Island Road is the road that runs north on the east side of the plant, isn't it?

A. You could say it was the Rose Island Road, we were on Sugar Company property before we ever got to the Rose Island Road.

Q. Yes, but it was along that road that you would go north of the plant and then turn in to the—

A. To the west.

Q. To get onto this high spot so-called?

A. Yes.

Q. That's where you did your trapping. I think that's all.

Mr. Pillon: I have no further questions.

[fol. 212] PITCHER, TERRY, was thereupon called as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

Q. Would you please tell us your name?
A. Terry Pitcher, 46 Washington, Sebewaing.
Q. What do you do for a living?
A. I work at the brewery.
Q. Is the brewery one of the, the brewery is right in Sebewaing, is it?
A. Yes.
Q. What is the name of it?
A. Sebewaing Brewing Company.
Q. Do you know the rate of pay that is paid to a person who starts to wo x in the brewery?

Mr. Smith: I make the same objection as I did before, your Honor. The same objection, I think it is immaterial and incompetent.

Mr. Pillon: I think I have a right to show the nature of the—

The Court: All right. I will overrule the objection, you may answer, if you know.

A. Well, I am secretary of the union there, I think they should know, there are different wage scales.
Q. You are the secretary of the union?
A. Yes.
Q. What is the starting rate?
A. Well, in the union it would be about 1.90, the lowest rate.
Q. About 1.90 an hour is the lowest?
A. They have different rates.
[fol. 213] Q. Now, are you connected in any way with the Sebewaing Fire Department?
A. Not now.

Q. In 1958 were you?

A. No.

Q. Were you one of the volunteers in this case?

A. Yes.

Q. You remember some of the incidents that occurred on December 21, 1958?

A. Some of them, yes.

Q. Now, all right, now when did you first hear the boys were missing?

A. Well, I believe Mrs. Heider, Herb's wife there, called up my place.

Q. Herb's wife, that is the grandmother of the boys?

A. Yes.

Q. She called your place?

A. And she told my wife and I think I talked to her, she was worried about the boys being gone. I just don't recall what time it was but it was getting late in the evening and—

Q. What did you do?

A. Well, I tried to console her for, told her, "Well, just, they're probably all right," and then I just set around for 10 minutes but it started to worry me a little bit so I started looking up some of the other fellows and I called somebody else, I don't know just who it was any more but by that time some of the, I think Mrs. Heider had called somebody else and, that the search party was started.

Q. So what did you do?

A. Well, we went to the fire hall and a bunch of us fellows met and we took different ways.

Q. Now tell me what you did specifically?

[fol. 214] A. Well, I and, I had my car and I had I think two or three fellows with me and I went down to the factory channel and drove out in the lake, out to the island.

Q. Out to where?

A. Out to the island and—

Q. I beg your pardon. Out to an island?

A. Yes.

Q. What island is that?

A. Lone Tree Island.

Q. Lone Tree, that's an island sitting out in the middle of the lake?

A. That is about three miles out in the lake, yes.

Q. About three miles out in the Bay?

A. Yes.

Q. Did you drive your car out there?

A. Yes.

Q. What was the temperature?

A. Cold.

Q. Weren't you afraid of your car going through the ice?

A. No, no, there was lots of ice on the lake.

Q. You drove your car out looking for the boys, is that it?

. . . . . .

A. But we couldn't find anything out there.

Q. Then what happened?

A. Well, on the way back in, another car came out about half way out and said they found the kids in the pond, so we went back.

Q. So then tell me, you drove back, what did you do?

A. Pardon?

Q. You drove back on the lake, where did you go then? [fol. 215] A. Well, look to see if we could drive, when the marsh is froze up up there you can drive right from the channel, you can drive out to the islands there and it was way back to where we started from, to look for the kids, or where they were driving up on the dikes.

Q. Well, did you get your car up on the dike, on the roadway up here?

A. You mean when I went on the lake?

Q. The lake is out here, isn't it?

A. That's right.

Q. All right. Now tell me what route you took to get over to the pond number 3?

A. What route we took to get over to pond Number 3?

Q. Yes.

A. Well, here's the lake—

Q. This is the channel here—

A. Here's the channel, and then there's, right around the end of the pond there is a road that goes out here (indicating).

Q. There is a road that—

A. A road that is just—

Q. What do they call it?

A. Well, I would call it, well—

Q. What do they call the name of the road, do you know?

A. Well, there is no name to it.

Q. It is a no-name road but it goes out this way, is that it?

A. Well, when the ice was heavy enough that marsh freezes and everything gets hard enough so that you can use that road, I wouldn't call it a road, I would call it a trail or a rut.

Q. It gets up here a little way before it gets to the end, then you go into the marsh—

[fol. 216] A. This isn't quite right.

Q. This isn't quite right?

A. You see, there is a sharp turn to the west here, what meets this here, what meets this pond right here (indicating).

Q. Well, all right. Anyway, you came back on this little trail later and then you turned and went up the road on the dike, is that it?

A. That's it, just about, no, you have got to come down here first and then go up.

Q. All right. Did you notice any, was there any barricade to prevent you from going up to see the pond that night?

A. Well, I don't recall, there was other cars going in and out there by the time I got there.

Q. And you drove around the pond number 3, is that it?

A. Well, yes, to number one, you got to go to number one there.

Q. You start around this way here and then—

A. That's right.

Q. And then you go around that way there. All right. Where did you stop to park your car in relation to the, this overflow pipe?

A. Well, I didn't. Now, that's, I made a little mistake there, I didn't drive my car up there, we had a, they had this, that barricade off the other drive, I parked my car right on the driveway going up.

Q. You parked in the driveway going up, they had a barricade for other cars, is that right?

A. That's right. We had a truck there at that time, they was just getting I think it possibly was the first boat, they was getting a boat from there and I went with the truck down to—

[fol. 217] Q. In other words, there was a truck and the first boat was coming up here—

A. Yes.

Q. And you parked your car here and got in the truck?

A. That's right.

Q. And then you drove up in the truck onto this—

A. Yes.

Q. All right, and then where did the truck stop at with relation to the overflow pipe?

A. Oh, just about right over there, I guess.

Q. Right over there and was there any boats in the water when you got there?

A. Well, I don't believe it because I was, I'd say no.

Q. Did you help put that boat in the water?

A. As I recall, I think I did, I did.

Q. And you, how long did you stay there after you first helped put the boat in the water?

A. Well, we worked with, we had pike poles there.

Q. You had what?

A. Pike poles.

Q. Pike what?

A. Pike pole.

Q. What's a pike pole?

A. It has got a hook on the end of it and I think they were from the fire department, they are 10 to 12 foot long, a pole, round pole, with a hook on the end.

Q. A hook on the end of it?

A. That's right.

Q. What did you do with those?

A. Well, we tried to reach down underneath this foam and ice there, we tried to reach down to get the kids.

Q. I see, and how high up was the foam in relation to the boat?

[fol. 218] A. Oh, it was up to the boat, was a small row-boat, the smallest one we could find there, up to the sides, up to the top and sides.

Q. How high was that?

A. Well, then the boat would run in the foam, we would have to bail or not bail, blow it out, I would say.

Q. Some of the foam went into the boat and you had to swish it out?

A. Yes.

Q. Do you recall what the temperature was that night?

A. Cold.

Q. Well, tell us, describe the condition there as you found it when you first got there, the physical condition, in other words, what you saw?

A. Well, what I saw, I didn't see much, all I seen was that, or all I thought was trying to get in there and trying to get the kids out.

Q. Well, do you remember very well what you first saw when you got up there?

A. No, I don't.

Q. Well, can you describe to us, do you remember how much an area was covered by, was there or wasn't there snow on the ground?

A. Well, I will tell you, I wasn't paying no attention to that, we knew the kids were in there and we wanted to get them out.

Q. How do you know they were in there?

A. By their tracks, according to what they said they found them in the pond there, somebody else had found the—

Q. Did you see the tracks?

A. I think I did, yes.

Q. What do you remember of the tracks, as you saw them?

[fol. 219] A. Well—

Q. Where did they go from and where did you see them start from and go to or tell us where you saw the tracks in relation to—

A. Well, I think they come from the south, as I recall they come from the south and they were walking along this pond here, what I mean that is a channel, you know how long—

Q. You say it is like a channel?

A. Well, around the inside of the dike, where they dredged out there had been that dike that is all—

Q. Well now, is this pond in your, is this pond a wide open pond—

A. No.

Q. Or has it got, is there land in the center of it and over the edge of it, or the top?

A. Well, there's brush, there's lot of brush and that stuff and it would—

Q. Is there an island at all in it?

A. Well, I just don't recall how high the water was in the pond that night, if it was dry on the other side or not.

Q. And how deep was the water that you poked the pole into, can you tell us that?

A. Deep enough.

Q. Deep enough. How long is the pole?

A. 10, 12 feet.

Q. Could you reach the bottom with the pole?

A. Yeah.

Q. Now—

A. I wouldn't even swear to that because we was feeling around where the kids were, feeling.

Q. Well, how much, you say you, was there ice?
A. Oh, yes.
Q. Was there foam?
[fol. 220] A. Yes.
Q. Was there snow?
A. Yes.
Q. Where were the tracks going from and where to, that you saw, if you saw them?
A. Well, they ended up in the foam.
Q. The tracks ended up in the foam?
A. Yes.
Q. Now, how would you distinguish or how did you tell what was foam and what was ice?
A. Well, it was treacherous, treacherous.
Q. Was it easy to tell the difference between them?
A. Well, I don't know, I only seen it at night. As I say, we was busy working, we was, when I got there to where we pushed the boat and then we started working that stuff, I mean, getting it back so—
Q. You said it was treacherous?
A. It must have been, the kids fell in.

Mr. Smith: I certainly ask, your Honor, that that be stricken.
The Court: That may be stricken.

Q. Now—

The Court: The jury will disregard that part.
Mr. Pillon: Well, let's go to something else and may we come back to it.

Q. Were you present when the first body was taken out?
A. No.
Q. How long had you been there, how long would you have stayed there when you first got there and started with the boat?
A. Well, I just don't know how long we worked but we worked for a while and then I helped go back to the fish [fol. 221] house to get some grappling irons, that's when

they found the first boy. They said the other boy might be right alongside of him but they hadn't got to him yet and I went back to the fish house to get some grappling irons, we figured we needed those and when we got back, why, they had found the one boy.

Q. I see and how late did you stay there working that night?

A. Oh, I imagine 2 o'clock.

Q. Well, was there any illumination or light of any kind there?

A. Well, we had a couple of police cars there, they shined their lights on.

Q. You had headlights of automobiles that were shining down into the pond there, is that it?

A. Well, I think they had spot lights.

Q. Oh, there were spot lights they had. What other lights were on?

A. I don't recall any, I don't believe the headlights would have reached the bottom.

Q. Did you have lanterns or you didn't have lanterns?

A. I don't recall. I think we had a couple of lanterns.

Q. Do you recall whether or not there was a moon out?

A. No.

Mr. Pillon: You don't. That's all.

Cross examination.

By Mr. Smith:

Q. How old are you?

A. 45.

Q. How long have you lived in Sebewaing?

A. 45 years.

Q. You are a native son?

[fol. 222] A. Yes.

Q. How long have you worked at the brewery?

A. Three years.

Q. Do you have minors, that is—

A. Yes.

Q. Boys under 21, working at the brewery?

A. Do we have minors up there?

Q. I am talking about, when I say minors, I am talking about boys, men, under 21 years of age?

A. No.

Q. Working in the brewery?

A. No.

Q. You can't work at the brewery until you are 21, can you?

A. Oh, yes, I think you can.

Q. Are you sure of that?

A. I'm not positive, I'm pretty sure you can.

Q. In any event, you don't have any youngsters working around the brewery?

A. No.

Q. You said that you didn't know how deep the pond was, I take it that is because you didn't try to see how deep it was?

Q. Well, when you arrived there the boats had not yet been put into the water, is that correct?

A. No, I didn't.

A. I think I rode out with the truck with the boat on it.

Q. Were you there the next day?

A. No, sir.

Q. At the scene of the accident?

A. No, sir.

Q. Then whatever you saw, you saw that night when you went out there?

A. That's correct.

[fol. 223] Q. And whatever you saw, you saw with the aid of spot lights that were on some automobiles?

A. That's correct.

Q. Did you ever cross over to the westerly side of the pond at all in the course of your working there that night?

A. The westerly side of the pond—

Q. That's the side that is opposite the railroad track, opposite to the pipe?

A. No, as I say, that on the west side, I think we did, it's, that was brush, what I mean, the pond isn't as it looks, it isn't open, it's all filled up but there is a channel around the outside more or less inside the dikes.

Q. Is there a, some sort of an island in the center of the pond?

A. Well, as I said, just where they dug it out and threw up for the dike and the rest is all brush.

Q. Doesn't that make an island, does that make an area in the middle of the pond that has trees or brush and grass growing on it?

A. Yes, it's a big island.

Q. It was above the water level that night?

A. That was.

Q. That center portion was above the water that night, wasn't it?

A. It must have been because it is now.

Q. Well, no, I don't want you to assume that it must have been because at some other time, I asked you whether you recall it being so that night?

A. I couldn't swear to it.

Q. From what point did you launch your boat?

A. Right up above the pipe.

Q. Just above the pipe?

A. Right next to it.

Q. Was that open water?

[fol. 224] A. We run the boat in there, yes.

Q. Was there any ice on it at all?

A. Right there where we run the boat from the bank?

Q. That's correct.

A. No.

Q. That's correct, there was not. Now, how much of an area was open water around the pipe?

A. Well, that's pretty hard, I—

Q. I want some estimate of it. We all know that you didn't carry a tape measure out there to measure it.

A. Well, there wasn't much open water, it was all open under the foam, it was mostly foam.

Q. Well, how much of it was open that you could see was open as you stood up there on the bank?

A. Right out to the end of the, where it was running from the one pond to the other, maybe 3 feet, four feet.

Q. Now, do you understand what I mean? I want to make it clear because we want to know what the facts were. It is my understanding that you were on the top of the dike and to the, it would really be southeast—

A. No.

Q. Of the pond.

A. Where the pipe runs through, yes.

Q. Yes, and it would be right close to the railroad track?

A. Well, we was on the other side of the dike, where we put the boat. You see, where they—

Q. You put the boat into the pond number 3?

A. Yes.

Mr. Pillon: Mr. Smith, you—

Q. And you put the, excuse me, sir, and you put it in right about at the point where the pipe emptied into the pond?

A. Right alongside the pipe.

[fol. 225] Q. Now, my question first was, was there open water around the end of this pipe?

A. Well, not very much.

Q. There was some?

A. Oh, at where the pipe was emptying out, yes.

Q. Now, how much of an area was that?

A. Oh, where the pipe was emptying, what I mean, is where the force was throwing this foam back, I don't know, it was possibly three or four feet.

Q. That would be 3 or 4 feet out into the pond?

A. Right from the end of the pipe, yeah.

Q. To how much of a distance on either side of the pipe was this—

A. Not very much, just to the end, really about—

Q. What would you say in feet, could you give us an estimate?

A. Well, I don't even know what size the pipe is, it is probably a foot pipe, might be a foot, inside of that.

Q. Then beyond that I believe you said was this foam and did you think the foam looked like soapsuds or bubble bath as it has been described here?

A. Yes.

Q. It didn't look like ice that you could walk on, did it?

A. Well, I wouldn't try it.

Q. And you know it didn't, didn't you, Mr. Pitcher?

A. Not right there, not in front of the pipe, it didn't, no.

Q. Now, back further to the northwest, there was a ridge of foam, was there not?

A. Back further? Not, no, I wouldn't say back.

Q. When I say back further, I mean to the northwest, away from the pipe?

A. No, it was as I say at the end of this open water right around the end of the pipe more or less was a—

[fol. 226] Q. Yes, around the edge of the pipe and in this, beyond this open water area which I thought you said was 2 feet by about 3?

A. Yes, I'd say that.

Q. There was a rim of this bubble bath foam?

A. Well, a rim that was just worked up, it just worked up so high and then it just levels off, the other way.

Q. Yes, and would it be fair to describe it as a ridge?

A. Well, I wouldn't call it a ridge either.

Q. Well, how would you describe it?

A. Well, it's, it was open water and this froth or whatever it is gets up there right next to this open water and then as it went back to the ice, why, it just kind of leveled off.

Q. It merged into the ice?

A. Well, or the ice merged into that.

Q. Either way. Let's say that they merged into each other, but where this merger area was, you had a hump of this foamy substance that was higher than the ice on the pond?

A. Yes, the pipe was on the edge, yes, that's showing one-half of it, one just one way.

Q. Would you like to come over and show us how it looked, if you will, please?

A. It is kind of hard.

Q. Do your best.

A. I would say that here's your pipe right here (indicating).

Q. That's the pipe.

A. All right and this there was down like this and down into the ice, also on this side the same way and also out toward the west the same way, the same thing, just a hump there in the middle.

[fol. 227] Q. Now, how far back from the hump was the hole in the ice that has been talked about here if you know?

A. I couldn't swear to that, where that is, you mean where the kids fell through?

Q. Yes, presumably they did.

A. Presumably. Well, it was back, I would say kind of back over here (indicating).

Q. And how far, could you give us an estimate of that in feet? And again we realize that it was not a measure, of distance?

A. Well, we grappled probably quite a ways, we started from here, the current was going, that come out of the pipe, it went to the north, it must have run down that way but on the south there was no use of grappling over beyond where you go to the south because we figured the current wouldn't take them that way at all, the current would take them with us, see, so how far, what was that question again?

Q. My question was, how far back from the hump, from the easterly part of the hump, was the hole through which you think the boys fell?

A. Well, it was beyond the reach of our boat, we know that when we first went in.

Q. That was a 15 foot boat?

A. No, it was I think about a 12.

1655

Q. A 12?

A. Maybe a 14.

Q. It was further than the length of the boat?

A. Oh, yes.

Q. Would you think it would be twice the length of the boat?

A. Yes, I would say from shore to the end of the pipe.

[fol. 228] Q. From the end of the pipe it would be more than twice the length, it would either be twice the length of the boat or more, is that correct?

A. Running—

Q. I don't want to tell you what it was, I want you to tell us what it was.

A. Well, I can't just swear to that, I have just forgot just how long, how far—the holes were from the end of the pipe. I might be wrong by saying 20 feet or 30 feet, I might be wrong. It was away from here, it was away from the end here (indicating).

Q. It was away from the hump?

A. From the hump.

Q. Did I understand—strike that. You could hear this water bubbling out of the pipe, couldn't you, if you were up there at the dike?

A. Well, I never paid any attention to it.

Q. You wouldn't say you could, you wouldn't say you couldn't?

A. I never paid any attention.

Q. All right. Did you go back the next day?

A. No, I didn't.

Q. So that all you saw, you saw that night from around 10:30 on when you were working there?

A. That's right.

Q. As I understood you to say, you weren't paying much attention to what went on except you were trying to grapple for the youngsters?

A. Yes.

Mr. Smith: That's correct. I think that's all.

[fol. 229] Redirect examination.

By Mr. Pillon:

Q. I just wanted to get a couple of the things there. Now, this wage of the brewery worker there, you said it was $1.90 an hour starting?

A. Yes.

Q. Now, in this diagram here, you show the hump up here on, about how high was that?

A. Oh, I would say two feet or—

Q. Two feet, and then it tapers off into the ice?

A. Yes.

Q. And you indicated that the hole apparently that the boys were at was about here, is that right, on the blackboard?

A. Well, about I would say as close.

Q. It was in the foam area?

A. Well, it was, it was either foam where it blew over the ice, it blows, that stuff will blow and then this was—well, as the ice gets, as the ice gets closer to that running water the ice thins out, too, it doesn't just drop off.

Q. Do you recall seeing any sign?

A. Pardon?

Q. Do you recall seeing any warning signs?

A. No, I don't.

Q. Was there a warning sign up by the, was there any sign by the water?

A. What do you call that?

Q. Did you see any sign by the water outlet?

A. I didn't notice that there was or not.

Mr. Smith: Did you look to see if there were any?

A. No, sir, I didn't.

[fol. 230] BRENNER, WALTER, was thereupon called as a witness of behalf of the Plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

Q. Were you out there this night?
A. Yes, I was.

The Court: State your name, please.

Q. Yes, what is your name?
A. Walter Brenner. 103 Fifth Street, Sebewaing, Michigan.
Q. What type of work do you do?
A. I'm a mechanic with the Ford Beers, Ford sales agency.
Q. You are a mechanic for Ford—
A. Beers Sales.
Q. On December the 21st, how did you hear that there was a search party on?
A. Well, I usually go down in the evening to the Log Cabin and have a cup of coffee, I went down there and my wife, she was employed there at the time and she told me about it.
Q. Did you go out and search to help?
A. Yes, I immediately went out.
Q. And how did you know to go to pond number 3?
A. Well, Mr. Shafer went with me from the Log Cabin and we walked down along the railroad track there.
Q. In other words, you and Mr. Shafer drove out this road that they have been calling the Bayshore Road, but is really Pine Street, isn't it or don't you know?
A. That's, I think it's Pine Street, yes, Pine Street.
[fol. 231] Q. We'll just call it Pine. You drove out there with Mr. Shafer and stopped somewhere—
A. Parked right in by the tracks.
Q. Parked by the tracks, and how did you know that it was up in this area here?

A. Well, there were lights out there already.

• • • • • • • • •

Q. When you got there, the one boat was already in, is that right?

A. They just had put it down to the ice.

• • • • • • • • •

Q. And do you know what the temperature was?

A. It was between 10 and 12 below.

Q. 10 or 12 below zero?

A. Yes.

• • • • • • • • •

Q. And now, I am going to ask you if you can identify this picture (handing to witness). It that a fair representation of the way it was after you men were out there working?

A. Yes, it is.

Q. And were you there when this picture was taken?

A. Yes, I was.

Q. You were. And you are in that picture?

A. That's me right there (indicating).

Q. You think that's you right there?

A. I'm pretty sure because I remember them snapping the picture up there on that bank.

Q. You remember them snapping that picture, and this is in relation to the conditions as they were out there at the time this picture was taken, this shows it accurately, does it not?

A. It does.

• • • • • • • • •

[fol. 232] HEIDER, MRS. ALMA, was thereupon called as a witness on behalf of the Plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

Q. Your name is—

A. Alma Heider.

Q. And you live where?
A. In Sebewaing, 326.
Q. And what is your husband's name?
A. Herbert.

• • • • • • • •

Q. And how long have you been married?
A. It will be 35 years this August.
Q. 35 years this August. How many children do you have?
A. Four.
Q. Four children and what are their names?
A. Donald, William, Herbert, Jr., and Sharon.
Q. All right. Now Donald is here in the court in here today, is that right?
A. Yes.
Q. Now, where is, you said you had Herbert, William and Herbert, Jr. Well now, where is William at?
A. He lives at Utica, Michigan.
Q. And Herbert, where is Herbert?
A. He's in Italy right now.
Q. Herbert was the boy who was at your home on December the 21st, is that correct?
[fol. 233] A. Yes, he was home for the weekend, that weekend.
Q. And what is the other, is it a girl?
A. Sharon.
Q. Where is she at?
A. She is a nurse at Harper Hospital.
Q. And that is in Detroit?
A. Right.
Q. Now, as far as your children, they had grown up and moved away from home, is that it?
A. Yes.
Q. And when did David come into your house, not David but James?
A. When he was 8 days old.
Q. He was 8 days old?

A. Yes.

Q. Now, did he stay with you all this period of time?

A. Yes.

Q. And who was David?

A. He was Donald's son by—

Q. I don't mean David, I mean James.

A. He was Donald's son by his first marriage.

Q. And where did your son Donald live?

A. When the baby was 8 days old and he lived with us, he was at home.

Q. He lived at home with you and the boy?

A. Yes.

Q. And for how long a period of time did he live there?

A. I think—

Q. With the boy?

A. I think James was either two and a half or three years old when he got married.

Q. So that from the time the baby was 8 days old, James was 8 days old, his father lived with you?

A. Lived with us.

[fol. 234] Q. And the child and your husband and yourself in your home in Sebewaing?

A. Yes.

Q. Or wherever you were living, for about 2½ years to 3 years until he got married?

A. Yes.

Q. Did you know that James, or Jim, was trapping?

A. Yes, I did.

Q. How do you know that?

A. Because I went with him.

Q. Did you always go with him?

A. Not always. I went with him when he started to trap, he wanted to trap and I said, "Well, where do you trap?" and I said, "I want to see where you are going first," so he took me down and showed me where they trapped.

Q. Now, do you recall the 21st of December, 1958, the time that David came over to your house?

A. Yes, he came over after dinner.

Q. He came over after dinner?

A. Yes.

Q. And did he and James start out to trap?

A. They were playing until about 3 o'clock, in the house, they were working on a model plane until about 3 o'clock, and then they or Jim asked whether he could still go out and set a few traps and I said, "Yes, providing they were back before 5 o'clock."

Q. And why did you want them back?

A. Because we had a church program in the evening and we had to have an early supper. My son Herbert was leaving back for Detroit and he wanted to have supper at 5 o'clock.

Q. Was Jim in that program at the church?

A. Yes, he was. He belonged to the Sunday schools, sang in the choir on Sunday morning.

[fol. 235] Q. Now, what happened after you told him to come back at 5 o'clock?

A. Well, they didn't come back when it was 5 o'clock.

Q. So what did you do?

A. Well, I was kind of provoked because they never did, he never did that when he promised something he always kept his promises, so I got in the car and I said, "Well, I'm going to go look for them."

Q. Where did you drive to?

A. I drove out to Bayshore where he had his traps set, I had been out there before on Thursday evening before to lift a trap and I knew just exactly where he was going.

Q. You had been out to Bayshore the Thursday before?

A. Yes, Thursday evening right after around 5 o'clock I went with him to lift his trap.

Q. Where did you go that Thursday evening?

A. Just out the Bayshore Road and stopped at the end of this dike they are all talking about, got out of the car and I didn't go back, he looked at his trap and he had a rat and

he got it out and threw it in the car and I didn't even shut off the motor, got in the car and we went back home.

Q. What do you mean, he had a rat?

A. A muskrat, what he was trapping for..

Q. Now, was this, where was this place that the trap was set?

A. That was the very first, the very first one at the end of the road there, the very first dike.

Q. In relation to, I have got you up here, this number four pond, in relation to that pond, was it over the embankment of the pond?

A. Where he had his trap set?

[fol. 236] Q. Yes, where did he have it?

A. On the other side of the bank.

. . . . . .

Q. And had you ever gone over the other side of that embankment with him?

A. Oh, yes, I went over the other side of the embankment with him just a short time before when he was duck hunting and there was very little water in it because I made the remark to myself, how could you get a duck where there is no water, and he did get a duck in there.

. . . . . .

Q. Was there a barricade of any kind across here to keep you from getting in?

A. Not where I went, at the end of the road, there was nothing there.

Q. Well, in order to get up onto the dike road and go over the embankment, the road runs up there, doesn't it?

A. Yes.

Q. In other words, the road runs up onto the embankment and where he set his trap he went over up onto the road and down on the embankment?

A. Just the other side of the bank where the little puddles were.

Q. Where the what?

A. Where the little water puddles were, that's where they set them, where there is a little water.

Q. All right. Now, you had, you said he was duck hunting over there, is that it?

A. Before trapping season, yes, and I went with him because he is not allowed to go alone.

Q. What do you mean?

[fol. 237] A. Well, he is a minor and he had a license but he was under age and you are not allowed to go hunting without a grownup, without an adult with you.

Q. You are not allowed to go duck hunting—

A. No, without an adult.

Q. Without an adult along, that is why you were along with him?

A. That's why I went with him, I went pheasant hunting with him, too.

Q. You went pheasant hunting with him, too. Did he have his own gun?

A. He had his own gun.

Q. Did he take good care of himself?

A. Oh yes, he was very careful. In fact, he didn't let anybody else touch anything that belonged to him.

Q. Now, this Sunday you drove down to this end of that road place first. What did you do when you got down there?

A. I got out of the car and I run up on the bank and I called, I looked every direction and it was around 5 o'clock and it was a quiet evening and there wasn't a sound anywheres and I called several times and I looked every direction and I didn't see anything, I got back in the car and came back home again.

Q. Now let me ask you this, was there any no trespassing signs in this area?

A. There was only one sign that said no parking.

Q. Only one sign that said no parking.

A. No parking.

Q. You are positive of that?

A. Positive.

Q. Now, is it, had you ever been back up into the area where pond number three is located before this tragedy?

[fol. 238] A. No, I never knew there was such a pond there.

Q. You never knew what was up beyond this pond here, is that it?

A. Never.

Q. You never drove up in there?

A. Never down to where that pond is, never.

Q. Well now, when you came back home then what happened?

A. Well, I called a few places, a few of his friends where I thought they might have gone on the way back, probably stopped.

Q. I am sorry, I can't hear you.

A. I called a few of his friends.

Q. Yes.

A. Thinking that they might have stopped in at somebody's house on the way home and forgot what time it was and none of his boy friends had seen or heard of him, that afternoon, so then I come back home again, and Herbert and I, the younger boy, he says he was getting provoked, he says, "He knows better than to stay that late, he never stays out like that," so he says, "Let's go there look again," so we drove out there again, the two of us, and we didn't see anything again.

Q. Where?

A. Out in the bay shore, the same area again.

Q. Went to the same area?

A. Same area.

Q. All right. Then what did you do?

A. Then we came, drove back and we drove around toward, down toward the Rose Island area.

Q. Rose Island so you can explain it to the, so you can explain it to me and the jury, is down this road, what road did you take to get there?

A. Rose Island?

Q. No, to get to this place—

A. The same road.

[fol. 239] Q. You came up this road here (indicating)?

A. Yes.

Q. From your house?

A. Yes.

Q. When you went to Rose Island how did you go?

A. Then you go around by the sugar factory.

Q. As you go back up Pine Street here?

A. Yes.

Q. Around the sugar factory onto US 25 and then you come down a road on the other side, is that it?

A. Yes, left of the highway.

Q. I didn't hear you.

A. Rose Island Road is left off of the highway and it runs along the Bay.

Q. It comes down behind these, is that this road immediately the other side of this sugar property?

A. Yes.

Q. Immediately the other side of the sugar property, and it comes down—

A. In fact, there is sugar property on both sides of this road.

Q. There is sugar factory on both sides—

A. I mean where they dump sugar beets is on one side and the other side is the sugar factory.

Q. In other words, Rose Island Road is, what direction does it run in? Does it run toward the west here? This is west (indicating).

A. No, it would be north and south.

Q. More angling?

A. More north and south.

Q. More north and south. As it goes out, it leads to the Saginaw Bay, doesn't it?

A. Round it, it leads around the edge of the Bay and there is cottages there.

[fol. 240] Q. In other words, you come out and it leads around the edge of the Bay and there is an island out there, is that it?

A. No, they call it Rose Island but it is not an island at all, it is just a resort.

Q. Oh, I get you.

A. We call it Rose Island but it is not an island.

Q. Rose Island is a resort, it is not an island at all, I see.

A. Yes, sir.

Q. And then after you went over in that area you didn't find the boys?

A. We stopped at two places, Charlie's Place and at the place at Heinz's place at Rose Island and we asked if any of the fishermen had seen any of the boys on the ice, thinking they might have wandered on the ice with their bicycle but nobody had seen them, so we came back and then my husband and I got into the car and drove out again, out to the Bayshore area, and we turned the car so that the lights would shine onto the ice and my husband got out and walked around.

Q. Where did you park your car when you came out the third time with your husband?

A. At the end of that road there, probably it must be over a little farther toward the Bay.

Q. Did you drive over toward this way (indicating) or down this way or what?

A. Over toward the Bay area. I don't recall just exactly. I stayed in the car and he got out.

Q. You put your headlights on?

A. He got out with the flashlight and he left the headlights on and he walked around and we called and tooted the horn. There was no response.

[fol. 241] The Court: I think we will adjourn now until next Wednesday, that will be the 15th of February, so will you all come back for the continuation of this trial at 9:30 on Wednesday, February 15.

* * * * * * *

Wednesday, February 15, 1961
9:30 o'clock a. m.

(Court met pursuant to adjournment.)

(Parties present same as before.)

Mr. Pillon: We are ready to proceed this morning but when we were here last Friday we did have the grandmother on the stand. But we have a few witnesses that we would like to get away early because the young boy would be out of school and Mr. Smith has agreed that we will recall the grandmother later.

The Court: All right. There being no objection, we will proceed.

(Exhibits are marked Plaintiff's Exhibit No. 20 and Defendant's Exhibit No. 21.)

KUNISCH, JAMES, was thereupon called as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

Q. What is your name?
A. Jim Kunisch.

• • • • • • •

Q. Jim, have you ever been on the witness stand before?
[fol. 242] A. No, I haven't.
Q. All right. And now just talk in a nice, clear, loud voice so we can all hear you, OK? How old are you?
A. 15.

• • • • • • •

Q. And where do you live at?
A. Sebewaing.

Q. Sebewaing, and what does your dad do?

A. He runs a clothing store.

Q. He runs the clothing store, and did you know James or Jim Heider?

A. Yes, sir.

Q. Did you know David Heider?

A. Yes.

Q. Yes, that's right. Were you with your dad on the night that they were trying to find these two boys?

A. Yes.

* * * * * * *

Q. Where did you start looking at?

A. We first went along the dikes.

* * * * * * *

Q. What do you mean by the dikes?

A. Well, where the water is, where you walk around.

Q. Is that over to where the Michigan—where is that at?

The Court: All right.

Q. Where is that at?

A. The sugar plant.

Q. What?

A. The settling ponds, around the sugar—

Q. The settling ponds by the sugar plant. Do you have any idea how many ponds there are over there?

A. No, sir.

[fol. 243] Q. Well now, you say you went around them, how did you go around?

A. Walked down the road.

* * * * * * *

Q. Well, when you first went out walking around the roads, did you find the boys?

A. No, sir, I didn't.

Q. What did you do next, you and your dad?

A. Well, we went back to the railroad tracks, we had some idea that they might have left their bike there.

Q. Yes, and what did you do then?

A. Well, we found the bike, we found the tracks.

Q. Now, who was with you?

A. There was my dad, my brother, and another boy from Sebewaing.

* * * * * * *

Q. Well, who found the bicycle?

A. We all did, together.

Q. You all did together and what did you do after you found the bike?

A. We followed the tracks down the—

Q. Where did the tracks go?

A. Went along the railroad tracks and up over the dike and onto the settling ponds.

* * * * * * *

Q. And then what happened, when you got onto the settling ponds what did you do?

A. Well, we didn't go on the settling pond, we stood on the dikes, the tracks went back and forth across the settling pond.

Q. The tracks went back and forth across the settling pond, could you see that good?

A. Yes, sir.

[fol. 244] Q. What time of day or night was it, do you know?

A. It was about 7:30.

Q. You say it's about 7:30. Was it already light out or was it dark?

A. No, we had flashlight, following the tracks with a flashlight.

Q. Following the tracks with a flashlight. Then what happened? Tell us what you saw.

A. Well, the tracks led into one big hole, two holes there.

Q. The tracks led to two holes there. Now, describe the holes.

A. One was real big, and it looked like both of the tracks led into it and then there was a smaller one off to the side where—

Q. Now, what tracks did you see by the smaller one?

A. The dog, the tracks of the dog.

Q. The tracks of the dog. Had the dog tracks led away from that small hole?

A. Well, no. They went around it and then came back to the hole. Thats' where they ended.

Q. The dog tracks went around and then came back to the hole, is that correct? What about the boys' tracks?

A. They went right into the big one.

Q. Right into the big hole. And when you looked at the, tell us what you saw as far as the conditions there? What did it look like to you?

A. It just looked like snow on top of ice.

* * * * * * *

Q. Could you tell any difference at all in what you saw?

A. No, sir.

Q. Between any of them?

A. No.

[fol. 245] Q. Now, I am going to show you a picture here, which is the Plaintiff's Exhibit No. 9, which is supposed to be a picture taken that night. Now, in what way is this picture different than what you saw?

* * * * * * *

A. Well, this was all covered with what looked like snow.

* * * * * * *

Q. These holes that were there, were they there then, there when you saw it?

* * * * * * *

A. Well, they were, it was covered up there, where the water came out and these holes, we saw them later when the sheriff came.

* * * * * * *

Mr. Pillon: I am going to offer in evidence again Plaintiff's Exhibit No. 9, which was the scene that was taken on the night of the occurrence and at approximately midnight

and identified by one of the witnesses before as being at the scene, * * *

Mr. Smith: It is my understanding it is offered to show the general view of the place where the accident happened and how it looked some time at least after people had been there with boats?

Mr. Pillon: That's right.

Mr. Smith: And broken the ice and done a lot of other things.

Mr. Pillon: Yes.

* * * * * * *

The Court: All right. Exhibit 9 will be received in evidence.

* * * * * * *

[fol. 246] By Mr. Pillon:

Q. Now try to get this a little clearer, you hold this picture here a minute. Now, the holes at the bottom of the pond, not the hole where it looked like water coming in, was that covered up, that night, when you first saw it?

* * * * * * *

A. Yes, sir, it was.

* * * * * * *

Q. This was all covered up, in other words?

A. Yes.

Q. Now, over here where this boat is, in the water, was that covered up?

A. Yes, it was.

Q. It was, and you see some holes that are there. We don't know whether, were they covered? You see there are some holes there, were they covered up or not?

A. No, they weren't.

Q. They weren't.

A. They were covered up before.

Q. They were covered up before?

A. Because—

Q. Well, how did the holes get there, do you know?

A. That's where the tracks led into.

Q. They were walking, the tracks led into those. There are how many holes, do you know, there?

A. One.

Q. One, all right. Well now, show me the one?

A. Here (indicating).

Q. What are these here (indicating)?

A. I don't know.

Q. You don't know, and are they holes or didn't you know?

A. I dont' know.

[fol. 247] Q. You don't know, and you believe the tracks led into this here, is that it (indicating)?

A. Yes.

Q. All right. Now, after you found out what the tracks led into, what did you and your dad and brother and Mr. Priebe do?

A. Well, I went back to find the sheriff, he was on—

* * * * * * *

Q. Yes. Where did you go to?

A. I followed the tracks back onto the road where they were parked.

Q. I see. And then did you bring the sheriff?

A. Yes, sir.

Q. And who was with the sheriff?

A. Mr. Heider.

Q. You mean the grandfather?

A. Yes, sir.

Q. And did they come back with you?

A. Yes, sir.

Q. Where did they go?

A. Well, they went up on the dike.

Q. In other words, did they follow the tracks with you?

A. Yes.

Q. I see. They went back up on the dike?

A. Yes, they did.

Q. So all of you went back in together, is that it?

A. Yes.

Q. And then what did you do next?

A. Well, the sheriff went back, I guess, and got the fire department to come out there with boats and grabbed them.

Q. And what did you do?

A. I went back with them, I went home then.

[fol. 248] Q. You went back into town and you went home. What school do you go to?

A. Sebewaing High School.

Q. And what grade are you in?

A. Ninth.

Q. Did you ever play with either one of these boys?

A. Yes, I did.

Q. Well, which one did you play with the most?

A. With Jim.

* * * * * * *

Q. Yes, was he about your age?

A. He is the same age as I was.

Q. He is the same age as you, and what did you and he do when you played?

A. We played basketball together in school.

Q. Were you both on the basketball team?

A. Yes, sir.

Q. And what else did you do?

A. Played baseball and Little League and went swimming together.

Q. Was Jim a good swimmer?

A. Yes, he was.

Q. Did you ever fish or hunt or trap together?

A. We trapped together and hunted, yes.

Q. You what?

A. We trapped together and hunted.

Q. Well now, did you and he have any traps?

A. Yes, we did.

Q. Both of you?

A. Yes, sir.

Q. Where did you trap at?

A. We trapped out by the pea vinery.

Q. By the what?

A. By the pea vinery.

[fol. 249] Q. How did you get the idea of going down the railroad tracks to look for the boys?

A. Well, my dad had the idea, he remembered that when he was small—

. . . . . .

Q. What kind of boy was Jim?

A. He was a good sport, nice guy, that was the reason he was my best friend.

Q. He was one of your best friends, is that it?

A. Yes, sir.

Q. And did you go to the same school together?

A. Yes, we did.

Q. What kind of marks did he get, do you know?

A. All I knew was his school work was average, I guess.

Q. Was he, how did he, where did he live at, do you know?

A. He lived with his grandparents.

. . . . . .

Q. Yes. Did you ever visit them?

A. Yes, I did.

Q. How often did you visit?

A. Quite often.

Q. And by quite often, you mean what?

A. Just about every day.

Q. Just about every day. How did he seem to fit in with his grandparents?

A. Good.

Q. Good, getting along good, and what about David, did you ever play with David very much?

A. Not too much, just when he came over and played football with us.

Q. He came over and played football. How did Jim and David seem to get along?

[fol. 250] A. Good.

Q. As far as what you saw out there that night, describing the condition, you couldn't, could you, see where the water came into the pond or not?

A. No, sir, I couldn't.

Q. What is that?

Q. You couldn't. Well, could you hear the water?

A. No, I couldn't.

Q. Do you know how high up the bank the water was?

A. I couldn't say.

Q. Well, would you say the tracks went across the pond and the tracks came back across the pond. Did you ever go down by the edge of the pond to see where the purpose of going back across the pond was for?

A. No, I didn't go down to the edge, but I believe I was, they were going back and forth trying to find places to put their traps.

Mr. Smith: Just a second, your Honor—

The Court: Yes, that would be objectionable.

Q. Well now, when you, you have had some experience setting traps?

A. Yes, sir.

Q. Where do you set them there?

A. Next to the holes, next to the holes and on runways.

Q. Next to the holes and on runways?

A. On runways.

Q. And where are the holes generally located?

A. On the side of the bank, near the water.

. . . . . .

Q. How do you do you tell a runway? I am from the big city, you will have to tell me.

A. The grass is usually flattened down, it is where they slide down the bank.

[fol. 251] Q. The grass is usually flattened down?

A. The grass and snow.

Q. In other words, you could see where they slide down the bank, is that it?

A. Yes.

Q. And you set traps along there, is that it?

A. Yes, sir.

Q. Did Jim and you ever catch anything in your traps?

A. Yes, we did.

Q. What did you do with them?

A. Sold them.

Q. Sold them. Where did you sell them, what animals did you catch, I am curious.

A. Muskrat.

Q. And did you catch any mink?

A. Yes, we did, one.

Q. I didn't hear you.

A. We got one mink.

Q. And where did you sell them at?

A. Well, we sold them here and in Bay City and there was a man over in Bay City, and then there was a man that came around.

Q. He came around to Sebewaing?

A. Yes, sir.

Q. He just came during trapping season, is that it?

A. At the end of trapping season.

Q. At the end of trapping season. Do you remember seeing any signs up there that night?

A. Signs? What do you mean?

Q. Any kind of sign at all on the property?

A. No, I didn't.

Q. Have you ever been in a car that is driven up there on these dikes?

[fol. 252] A. Yes, I have.

Q. How often have you driven up on the dikes?

A. I couldn't say.

Q. Has it been more than once?

A. Yes.

Q. How do you get up there?

A. Through a gate on the other side.

Q. I see. Is there a wire or something across there to prevent you from going out?

A. Sometimes there is, sometimes there isn't.

Q. Sometimes there is and sometimes there isn't, I see, and what did you do if it was up? Did you go in or what?

A. You can't, it is blocked off.

Q. Did you ever go hunting?

A. Yes, I do.

Q. Did you go hunting?

A. Yes.

Q. Did you ever go hunting out in the Michigan Sugar ponds?

A. No, I never.

Q. If you had been along with him that night, would there have been anything that you can recall, anything that you saw, that would have prevented the same thing happening?

Mr. Smith: Oh just a second. That's a completely incompetent question.

The Court: Yes, I think I will sustain the objection.

Mr. Pillon: I am just trying to find out if there was anything else—

The Court: All right, you may ask him any facts which he saw but to ask him to draw conclusions as to what might have happened would be incompetent and I will sustain the objection.

[fol. 253] Q. What about Jim in relation to church, did he go to church?

A. Yes, he did.

Q. Did you go to the same church?

A. Yes.

Q. What did he do in church in relation to any, tell us what his activities were in the church?

A. Sang in the choir.

Q. He sang in the choir?

A. Children's choir.

Q. And what else?

A. And he was planning to join the Walther League after he was confirmed.

. . . . . .

Q. The Walther League, what is the Walther League?
A. Well, it is a church organization for young people.

. . . . . .

Mr. Pillon: This man here may ask you some questions.

(Juror No. 6 raises his hand.)

Mr. Pillon: Your Honor, there's a member of the jury might have a question. We are wondering if he might have the juror write down the question and hand it to the Court and the Court can decide if it is a proper question.

Mr. Smith: I don't know if it is proper or not.

Mr. Pillon: This is the proper procedure when a juror has a question because I have been involved in situations like that before. He merely writes it down on a piece of paper and your Honor has to pass upon whether it is a valid question and proper question to be asked by the witness.

The Court: Well, is it a question which requires answer right now or can we take it up at recess?

[fol. 254] Juror No. 6: Your Honor, it is a question of clarification of the statement the witness made that I did not understand the meaning of his answer.

Mr. Smith: I have no objection if the Court thinks it is all right. It is a little unusual.

Mr. Pillon: I would suggest first, I am not trying to inconvenience the juror, just to write it down.

The Court: Could you do that conveniently or not, write your question?

Juror No. 6: Yes.

Mr. Pillon: Then your Honor of course can decide if it is a proper question. If it is we will be glad to have it answered.

(Juror writes out the question and hands it to the Court.)

(Conference between the Court and counsel.)

Mr. Pillon: Now, to answer this juror's question, you said you set traps near holes. He wants to know if you mean holes in the ice or the banks or what holes, so describe it?

A. Holes in the banks.
Q. Holes in the banks?
A. Yes, sir.
Q. Now, the banks of what?
A. Of the settling ponds.
Q. The settling ponds and near, and where would the holes be located?

Mr. Smith: I don't understand that this witness ever set a trap anywhere on the settling ponds. He set his traps at the pea vinery if I understood his testimony right.

A. That's right.

Mr. Smith: Is that right, sir?

A. Yes, sir.

[fol. 255] Mr. Smith: I object to any questioning about where he set any traps anywhere except where he sets them.
The Court: All right.

Q. Maybe we can clarify the point. Did you see any evidence that any traps had been set by the boys?
A. No, sir, I didn't.
Q. This just comes from your knowledge as a hunter, is that right, trapper?
A. Yes, sir.
Q. Or trapper, that's right. I believe you had testified that in your experience the hole was located near where?
A. Which do you mean?
Q. I believe you said something about water, any relation to the holes and water?
A. Yes, sir. Some of them were under the ice, under the water.

Q. The holes are, and how do you know this?

A. Do you mean in the settling ponds?

Q. No, just tell me from your general experience, we will go into the settling ponds when we get to that. How do you know that?

A. I know that's where I set most of my traps, under the water.

Q. You set most of your traps where?

A. Under the water.

Q. Well, when is the hunting season, I mean, hunting, trapping season, there might be a difference.

A. I believe it starts December 1.

Q. You believe it starts December 1. How long does it last?

A. Until January, some time in January.

Q. Some time in January?

A. Some time at the end.

[fol. 256] Q. All right. Now, in your experience have you, did you ever set traps where the water has been frozen?

A. Yes, sir.

Q. And how do you do that?

A. Well, mostly where there's a hole, the ice is thin.

Q. Where there is a hole. You mean where the animals are at?

A. Yes, sir.

Q. And you, now you say you set the traps over where? Your own traps?

A. At the pea vinery.

Q. At the what?

A. Pea vinery.

Q. Pea vinery?

A. Yes, sir.

Q. Well, do they have ponds?

A. Well no, it's a regular creek.

Q. Oh, it's a creek. There is water in the creek, is that it?

A. Yes, sir.

Q. And does that water freeze up in the winter time?

A. Yes, it does.

Q. How wide is that creek?

A. About four feet.

Q. Did you set traps on both sides of the creek?

A. Yes, sir.

Q. Well now, how do you get from one side to the other side?

A. Across the ice.

Q. Across the ice. Do you generally have any type of device with you in determining where the holes are at?

A. No, sir, just along the side, a long stick.

Q. You usually carry a long stick with you, is that it?

A. Yes, sir.

[fol. 257] Q. And what do you do with that stick?

A. Well, I push open where I believe there is a hole, take a stick and poke it up and see how far the hole goes into the—

Q. And then from that you can tell?

A. Well, if the hole keeps going into where I can't push the stick any further, then I can set a trap.

Q. Set a trap there. Now, did you see anything when you were there that night to indicate that the Heider boys had done the same thing, by that I mean, show that they were doing the same thing?

A. No, sir, just that, well, they were walking back and forth across the pond.

Q. I see, well, did you see any place where they had—I will withdraw that. Did you ever hunt down along the Bayshore?

A. Yes, sir.

Q. What you call the Bayshore is down by the edge of Saginaw Bay, is that it?

A. Yes, sir.

Q. Do you, is that, do you recall whether or not there is a channel that leads out into the Bay?

A. Yes, there is.

Q. And in relation to that channel, which side of it do you go hunting?

A. Either side.

Q. Either side. Do you know where the first pond is at, by the, let me just go over to the board here, maybe I can make this clearer. Assume that this is the Bay area here, you know, Saginaw Bay (indicating), and this is the, this is all Bay right here, here's a road that comes in by or to the church property, over here, past the channel.

A. Yes, sir.

Q. Do you follow me so far?

[fol. 258] A. Yes.

Q. Has any part of this channel got a fence around it?

A. No, sir.

Q. I see. Do you know where this little pumphouse is?

A. Yes, it is at the end of the channel.

Q. Is there a fence around that or not?

A. Yes, there is.

Q. Yes, there is. Is there deep water in there?

A. I believe it is, yes, sir.

Q. Did you ever go swimming in there?

A. No.

Q. When you hunt, did you go out this way, or out into the Bay itself or what?

A. Out into the Bay.

Q. Out into the Bay. Do you know where this first pond is, here we have got number four, we will call that number four pond, and these marks indicate outlets into the Bay. Have you ever been in that pond? Ever see it?

A. Yes, I have.

Q. Have you ever hunted in there?

A. No, sir.

Q. Ever set traps in there?

A. No, sir.

Q. You hunted down this way too, as I understand it?

A. Yes.

Mr. Smith: Will you indicate which way you mean, sir?

Q. South, down south of the channel. And do you go swimming in the summertime out here?

A. No.

Q. Where did you go swimming at?

A. In the airport cuts.

[fol. 259] Q. By the airport?

A. Yes, sir.

Q. What did you hunt for when you did hunt?

A. Ducks, and pheasant.

Q. Ducks and pheasant. Did you ever go along the railroad tracks?

Q. Hunting?

A. Yes.

Q. Ever shoot any ducks or pheasants?

A. Not along the railroad track, pheasants.

Q. Pheasants you have shot along the railroad track?

A. Yes, sir.

Q. Do you remember Jim was a member of the Boy Scouts?

A. Yes, he was.

Q. Were you?

A. Yes.

Q. Did you belong to the same group?

A. Yes.

Q. Do you know if he had earned any of his merit badges?

A. I believe he earned some of them.

Q. And do you know what they were in?

A. One was safety and—

Q. One was safety and what was the other one?

A. I don't know what the other one was.

Mr. Pillon: I have no further questions.

Mr. Smith: No questions, James.

Mr. Pillon: That's all.

[fol. 260] WILTSE, CHARLES, was thereupon called as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

Q. Your first name, sir?
A. Charles.
Q. What is your profession, sir?
A. Funeral director.
Q. You are a funeral director where?
A. Sebewaing, Michigan.
Q. Did you know these two boys?
A. Yes, I did.

* * * * * * *

Q. How many, how far away do you live from where Jim lived?
A. Approximately across the street.
Q. Across the street. How far away did you live from where Jim lives?
A. About a block.

* * * * * * *

Q. They appeared as far as the physical condition was concerned, like normal, healthy average boys?
A. I would say normal.
Q. What about the habits or their, mentality what did you observe?
A. I would say average.
Q. You would say average. Did you participate, or were you a coach of any kind?
A. Well, we coached 7th and 8th grade boys at basketball.
[fol. 261] Q. You coached 7th and 8th grade boys at basketball. All right. Did you ever coach either one of the Heider boys?
A. Well, James.

Q. James. You were his basketball coach then?

A. Yes.

Q. Well, tell us, how many boys did you have that played basketball, a whole class, is that it?

A. No; it was an extra-curricular activity which was strictly voluntary.

Q. An extra-curricular activity which was strictly voluntary. Tell us about James?

A. Well, he came out for it, he was very interested in it.

Q. He was very interested in it. Did he play?

A. Well, practice.

Q. I see. Did you have games, basketball games?

A. We do have, yes.

Q. Did he participate in the games?

A. I don't recall if we had games prior to the accident or not, I don't recall.

* * * * * * *

Q. I will not try to rush your recollection, but did they ever play a game with Holy Cross?

A. You mean prior to the time of—

Q. While Jim was alive?

Mr. Smith: I think what you are trying to find out is what games James played, aren't you, not the team but what James played?

* * * * * * *

Q. What I am trying to find out is what kind of boy James Heider was, that is Jim, and I just asked you this, to search your recollection and memory and tell us the best you can what you remember about it.

[fol. 262] A. I have been doing it.

Q. What do you remember?

A. About now what do I remember, along what lines?

Q. Well, was he, what were his traits and characteristics, if any you remember?

A. Well, he was active that I would say he was quite interested in sports, outdoor activities, at least that's my impression.

Cross examination.

By Mr. Smith:

Q. As I understand it, Mr. Wiltse, you were kind of a volunteer basketball coach?

A. That's right, that's right.

Q. Among the boys who participated in the practice events while you were coaching the team was James Heider?

A. That's right.

* * * * * * *

KUNISCH, JAMES, was thereupon recalled and testified as follows:

Cross examination.

By Mr. Smith:

Q. James, if you will stand up here, please, and take this photograph, this is a newspaper picture which is marked Exhibit No. 9 and come over here where the jury can see, and turn it around this way so everybody can get a look at it, and show the jury the hole that you think you saw when you got out to the place opposite the railroad track where this accident happened?

[fol. 263] (Witness indicates to the jury.)

Q. Now, will you just put a ring around it with a pencil and mark it with your initial so we will all remember it.

(Witness following directions.)

Q. That will be J.K. All right, sir. Now that's the only hole that you saw in the ice that night that you remember that you were out there, is that right, is that correct?

A. I remember seeing that hole.

Q. Where was the other one, does it show in the picture?

A. No, it doesn't. I believe it was over on the side.

Mr. Pillon: Well just a minute. What did he say?

Q. Now then, put a ring around where you think it was.

(Witness indicates.)

Q. Well, maybe you better put your initials there, too, James. Now, while we are standing up here with the picture in your hand, can you tell us which way you are looking when you look into that picture, whether it is north, east, south or west?

A. It would be northwest.

Q. Northwest. Now, where would you be standing as you look down on to the, where did you stand as you looked down on to the pond from the bank that night?

A. What do you mean on the bank?

Q. Yes.

A. Well, it would be on top of the bank.

Q. And I understand that that railroad runs northeast and southwest?

A. Yes, sir.

Q. And you walked along the railroad, did you, that night?

A. Yes, sir.

[fol. 264] Q. And when you got to a point opposite this one you saw that the tracks led in from the railroad track up onto the bank, is that right, and is that how you come to turn in there and follow the steps into the bank of the pond?

A. Yes, sir.

Q. As I understand it, it was dark?

A. Yes.

Q. But do I understand that you had a flashlight or several flashlights along with you?

A. Yes, sir.

Q. Who all had flashlights, do you recall?

A. All four of us.

Q. Now what you saw that night then you saw with the aid of your flashlight?

A. Yes.

Q. I further understand that you did not go back the next day to see anything over there?

A. No.

Q. When you looked down onto the pond from the top of the bank, looking from the bank to the northwest, did you say?

A. Yes, it would be northwest.

Q. How far from where you were standing at the top of the bank you say this hole was, the larger one, that you had marked with your initials first?

A. I couldn't say, I don't know how far away.

Q. Well, take a look down this room and tell me in comparison with the length of this room, what you think it would be, whether it would be the length of the room or less or more?

A. I would say about from here to the end of the room.

[fol. 265] Q. About from here to the other end of the room?

A. Yes, sir.

Q. All right. We will put a mark on the floor here and we will measure that after a while. And did the rest of the area look like it does now in the picture around the hole?

A. Around the hole?

Q. Yes, sir.

A. It was covered, this here was pushed over to this here, this was all covered here.

Q. Now, you are indicating another hole over on the to the right hand side of the photograph as you look at it that was covered over, are you not?

A. Just like here, yes.

Q. So we will be sure which hole you are talking about now as being covered over, will you mark that with a pencil and put your initials on that, too. Did you walk down on the ice?

A. No, sir.

Q. Do you understand then that whatever you saw, you saw as you stood on the bank of the pond?

A. Yes.

Q. You never did go down on the ice?

A. I went on the edge of it, of the ice but not on it.

Q. When you say the edge of the ice you mean you went down the—

A. The side of the—

Q. The side of the bank down to where the surface of the ice was?

A. Yes, sir.

Q. But never went out or onto it?

A. No, sir.

Q. That's all you know about it?

A. Yes, sir.

[fol. 266] Q. The only trapping that you did, you did over by the pea vinery?

A. Yes, sir.

Q. The pea vinery is a place where they take the peas and shuck them?

A. Yes.

Q. Where is that located in Sebewaing?

A. It is out—

Q. How far is it from the Michigan Sugar Company property?

A. A couple of miles.

Redirect examination.

By Mr. Pillon:

Q. In other words, you trapped all along those places like the Sebewaing River, is that it?

A. Yes, I trapped at the sugar company before with my brother.

Q. You just said that about two years ago, before this happened, you did some trapping, where at?

A. In those ponds.

Q. What do you mean, in those ponds?

A. Well, on the banks at the sugar plant.

Q. At the sugar factory, the very ponds that we are talking about here, the pond which Jim, James and David Heider, drowned in, you had trapped that very pond yourself two years before, is that it?

A. No, not in that pond.

Q. Not in that pond. What pond did you trap?

A. Well, we have been north of that.

Q. North. North of that pond, is that it?

A. Yes, sir.

Q. How did you get onto it?

A. On the road.

[fol. 267] Q. You drove up, somebody drive you?

A. No, we walked up.

Q. You walked up. How did you get there, you walked up onto the road and set the traps at the pond?

A. Yes.

Q. Where did you get up on to the road then?

A. Well, over on Bayshore and that, that number four pond there, we went on—

Q. Number four you walked up there?

A. Yes, sir.

Q. And then you set some traps up in that Michigan Sugar pond property two years before but you say there was a pond north of pond number three?

A. Yes, it would be right above that, I believe.

Q. In other words—

A. Well, it was a ditch, actually a ditch, that ditch right there.

Q. Oh, this ditch right here?

A. Yes, sir.

Q. And you set traps in that ditch?

A. Yes, sir.

Q. Now, that ditch is a, is there a pond just north of this?

A. I believe so. Right now I don't know if they just put that in.

Q. You believe so.

A. Yes, sir.

Q. Well, when you were there, that would be in '56 you were there, eh?

A. I was.

Q. Did you have a right to be on any of those ponds?

A. No, sir.

Q. Well, let's see, how old were you in '56?

A. I was 11 or 12.

[fol. 268] Q. 11 or 12. So when you were 11 or 12, you went up and you set traps along this, of course there is a ditch there, along this area here, is that it?

A. Yes, sir.

Q. How far up into the property did you go?

A. I couldn't say, not over the railroad tracks.

Q. Not over the railroad tracks, but you started down here where the road comes up and you went over, did you go over as far as the bank near the railroad tracks?

A. I believe so. And then we had more traps set down right where the railroad track crosses that, the road, there were a couple more ditches that ran along the railroad track.

Q. There is another ditch that runs along the road here, does it?

A. Yes, sir.

Q. This is a ditch, then it branches off up the railroad track?

A. On the other side of the tracks.

Q. It goes down this way, does it?

A. No, on the other side.

Q. Oh, on the other side, it goes north on which side of the railroad?

A. The other side, the left side.

Q. This side here?

A. Yes.

Q. So that you sat traps up in here, all the way up to the railroad and then—

Mr. Smith: I don't understand that he ever testified that he set traps all the way up to the railroad. My understand-

ing was that he never went to the railroad, and I object if your Honor please, to leading questions which would get into an important phase of this case.

[fol. 269] The Court: All right. Will you clarify it then without leading the witness?

Q. Well, let's take here the road and the railroad here. Now, you say there is a ditch on which side of the railroad?

A. The left side.

Q. The left side, and it runs from the road, how far up along the railroad track does it go?

A. It stops before it hits that number three pond.

Q. It stops before it hits number three pond. Well, whereabouts does it stop at, roughly? Give me an idea.

A. Oh, a little—

Q. Come over here, we will make a mark by it—are you left handed or right handed? How far is it?

A. Right about there (indicating). And then I believe it goes this way.

Q. And you believe it goes that way?

A. Yes.

Q. Where did you set traps at along there?

A. In here (indicating).

Q. Through there. Now, these cross marks you have placed indicate where you set traps?

A. Not exactly.

Q. Not exactly but they were in that vicinity?

A. Yes.

Q. Now, when you came up onto the sugar company property then, show us where you set them, set other traps?

A. Well, along, right along in here where I set the traps.

Q. This, you said in relation to the railroad, I believe you said there was a ditch there. Did you say there is a ditch that ran out into the Bay?

A. I don't say it runs out into it.

Q. You don't say it runs out into the Bay?

[fol. 270] The Court: Does the jury hear the witness?

Juror: No.

The Court: I don't think they are getting all of it.

Q. All right. Did you set any, where else did you set traps at, if you can recall?

A. Those are the only places.

The Court: Will you talk so all can hear you, we are all interested.

Q. In other words, when you were 11 or 12 you set traps along this ditch and up here around the number four pond, is that it?

A. Yes, sir.

Q. And you didn't go along the, you said that there was an area north of number three pond, what is that area?

A. I believe it's a pond, there's a woods over there, trees.

Q. Trees.

A. But I can't remember if there is a pond or what.

Q. Did you ever set traps out there?

A. No, sir.

• • • • • • •

Recross examination.

By Mr. Smith:

Q. You said you had put some traps up to the north and toward the Bay a couple of years before 1958, is that what you said?

A. Yes, sir.

Q. Now, did you set those traps on number four pond or did you set them out into the swale there out in the marsh?

A. Out in the marsh.

Q. How far out in the marsh were they from the bank of the pond?

[fol. 271] A. Only about 5 feet.

Q. That would be to the west, eh?

A. Yes, sir.

Q. And the others you put, you put on the railroad track?

A. Not on the railroad, next to it.

Q. Right in the ditch on the railroad track?

A. Yes.

Q. It is kind of a bad place for a muskrat to be, wouldn't it? But you are talking about the ditch that runs alongside of the track, are you not?

A. Yes.

Mr. Smith: I think that's all, sir.

* * * * * * *

PITCHER, EDWARD, a witness on behalf of the plaintiff, was thereupon recalled as a witness and having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

Q. You were on the witness stand before in this case, and you understand you are still under oath?

A. Yes.

Q. I just want to show you, I want to show you Plaintiff's proposed Exhibit 9 here. Now, would you circle the place where you think, where the hole, let me stop, take the pencil first. Would you put a circle on that picture where you saw the hole that the boys went in?

Mr. Pillon: I want to show you first of all this exhibit and call your attention to the extreme left hand side of that picture where there is a circle and the initial J.K. Is that the hole that you saw there that night when you first arrived upon the scene?

[fol. 272] A. No, no.

Q. Whereabout on the picture would that hole be that you saw?

A. It would be more over to the, to the other one.

Q. Would you circle where you—

A. The boy has got a circle there, I would say was one of them, he has got two circles there, was—

Q. Well, how many holes did you see when you were there that night?

A. Well, I saw one, one was where we could get the boy out.

Q. Yes.

A. And over there about a foot or two was another hole but the boy must have come to there and broke it because there was a track there—

. . . . . .

Q. Draw a circle on that picture where you saw the hole?

A. Well, I won't get it right perfect but it would be pretty close.

Q. Put your initials.

A. All right.

Q. Did you see any other hole there that night?

A. Yes.

Q. If so, put it on the picture where you see—

A. Well, there was a small hole off to the side of it.

Q. Make a smaller hole and circle it, make the hole smaller and put your initials on it?

A. There was no tracks going to it.

Q. Put your initials on it.

(Witness indicates.)

Q. Now, those are the only two holes that you remember seeing there that night when you, after you first arrived?

[fol. 273] A. Well, any time you, poke a pole down, you made a hole, they kind of messed them up.

Mr. Pillon: But the two holes you saw when you got there, you put the circle on the picture, all right, thank you.

Mr. Smith: May I see it, please?

Mr. Pillon: Yes.

Mr. Smith: I think that's all, sir.

HEIDER, ALMA, a witness on behalf of the plaintiff, thereupon resumed the stand and having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

Q. We had you on the stand last Friday. Now, you understand you are still under oath?

A. Yes, sir.

Q. All right. As I recall, we were on December the 21st of 1958, with you. Well now, going back to the night of the search when you were looking for the boys. You had testified last Friday, it would be my recollection, you had gone out to the Rose Island Road looking for the boys, is that right?

A. Yes, sir.

Q. And what happened then? What was the next thing that happened?

A. Well, we didn't find them anywhere. We inquired at two different resort areas, asking whether the fishermen had seen them and nobody had seen them, so we came back home again.

Q. And then when you got back home what happened?

A. Well, I stayed at home.

* * * * * * *

[fol. 274] (Card is marked Plaintiff's Exhibit No. 20.)

Q. Would you please merely identify this for us, it is Plaintiff's proposed Exhibit No. 20.

A. That is the card from the funeral home.

Q. The card from the funeral home?

A. That's right.

Q. All right.

Mr. Smith: Well, tell me what purpose you could have in offering in evidence a funeral card?

I object to this, your Honor, as prejudicial. It is designed for no other purpose except to inject into this case something that doesn't belong there.

Mr. Pillon: Before this I had suggested to counsel we excuse the jury when we went into this phase of it because your Honor is trying the case involving James. I would like your Honor to see this document because it shows on here how they listed the boy in relation to who his parents were, just to show you how strong the attachment was a part of this case and I think it is essential and necessary.

I am not concerned, I am not trying to prejudice anybody, the jury or anybody else, and I told my brother counsel in the beginning—

Mr. Smith: Well, we can't—

Mr. Pillon: If you want the jury excused and he said no, he didn't want it, so we claim that the card—

Mr. Smith: Just a second. I object to it.

The Court: I just want to hear why he claims he is entitled to present it in evidence.

I understand your objection and I want to know what reason the plaintiff's counsel has here for offering it.

Mr. Pillon: Because the card itself in there specifies the boy Jimmy and specifies that his parents are a Mr. and Mrs. Herbert Heider and not Donald Heider, I want [fol. 275] to show how the family felt about this boy in the home, he was raised by the grandparents.

The Court: Well, I haven't seen it, I may not understand it clearly but I would think it would not be admissible there.

Mr. Pillon: The point I am getting at is this, you have a boy who was raised by his grandparents—

The Court: I would have to look at the card—

Mr. Pillon: If your Honor would just merely read it, it is for your Honor's determination, it is not for the jury's determination.

I don't care whether you have to read it to the jury or not but the point I am getting at is the relationship

set forth in the card on the one boy, is what I wanted to call your Honor's attention to, and that's what I wanted it specifically for.

The Court: It would be self-serving in any event. I can't understand how it would be admissible here.

Mr. Pillon: All right. Now I will explain to your Honor, we are here having to determine certain facts in the case and one of them is the element of damages and one of them is the companionship of the boy in relation to the family.

Now, he lived, James lived with his grandparents.

Probably the Court can excuse the jury because—

Well, I will say this, until the end of the morning's session and then we will excuse the jury and then we can present it to your Honor.

The Court: All right.

By Mr. Pillon:

Q. What is your age?

A. 54.

Q. Did you sit down here with your husband while you computed this bill of particulars relative to the maintenance of keeping Jimmy?

[fol. 276] A. Yes.

Q. Now, what shift did your husband work?

A. 3 to 11.

Q. 3 to 11. What type of a boy was Jimmy?

Mr. Smith: This has all been covered on direct examination.

Mr. Pillon: I am still on direct examination.

Mr. Smith: I was just wondering if we didn't go over all this.

Mr. Pillon: The first question I believe I ever asked her was when the boy first came to live with her when he was 8 years old. That is the only question I ever put in that way. We have got to add a little more detail.

Q. Did Jimmy play basketball?

A. Yes.

Q. All right. Now tell us, where did he play basketball at?

A. In the Lutheran school.

Q. And was he, or was he not on the basketball team?

A. He was on the team, he played on the Friday night previous with the Saginaw Holy Cross team.

Q. On Friday night previous to the accident?

A. Previous to the accident, yes.

Q. In this matter he played where at?

A. In Sebewaing.

Q. In Sebewaing?

A. Yes.

Q. And they played against Holy Cross?

A. Saginaw Holy Cross.

Q. Saginaw Holy Cross, and had your boy played in other basketball games?

A. I don't recall but I remember I was there that night because they won the game and the coaches took them all out for an ice cream after the game, I remember that [fol. 277] distinctly, because I didn't bring him home with me, I let him go with the rest of the team to the soda bar.

Q. Now, was Jimmy a Boy Scout?

A. Yes. He was a cub scout first and then a boy scout.

Q. Did he go away to camp?

A. Yes.

Q. Now, there is some question this morning about him having a couple of merit badges. What were they for?

A. Swimming and safety.

Q. Swimming and safety.

A. He had a few other ones for handicraft and a few other things that I just don't recall, I could have brought them.

Q. Was he an obedient child?

A. Yes.

Q. I didn't hear you?

A. Yes.

Q. Physically, what was his condition?

A. He was never sick, only one time he had an appendectomy, that's the only time he ever was sick with anything, seriously.

Q. Well, what type of boy was he mentally?

A. Well, I guess he was average, like the boys, just average.

Q. Well, what about around the house?

A. We had no trouble, ever, with him around the house.

Q. Average. Well, at night would he be home?

A. He was home when he wasn't at Boy Scout meeting or anything special, he was home.

Q. I think your husband worked at nights?

A. Yes.

[fol. 278] Q. Well, what did, then you were just home in the evening alone with the boy?

A. Yes.

Q. If he wasn't out at the Boy Scouts or something, is that correct?

A. Yes.

Q. What did this mean to you?

A. What would you say?

Q. Was it companionship?

A. He was all we had at home.

Q. He was the only one you had at home. Could you put any estimate on the value of his companionship, witness?

A. No, sir. No, sir.

Q. Do you have any idea what he wanted to be?

Mr. Smith: I object to that as immaterial.

Mr. Pillon: I don't think it is an improper question.

The Court: Yes, I will take the answer.

Q. Do you have any idea of what he wanted to be when he grew up?

A. Well, he always wanted to go to college and play sports, that was a big ambition, to be a big football player. That was, anything in the line of sports is what he wanted.

Q. He wanted to go to college?

A. College, we had plans, yes.

Q. What plans did you have for going to college?

A. We had—

Mr. Smith: I object to that, your Honor, as speculative.

Mr. Pillon: It is not speculative. As a matter of fact, he wasn't going to, I have a right to show he just wasn't going to finish school and then stop there.

The Court: All right. I will take the answer. Objection overruled.

[fol. 279] Q. What plans did you have for him?

A. He had planned on going to Michigan State if possible and between us and he had a, he has an uncle that's a bachelor, we were going to send him to college, that was their plans.

Q. Other than just being interested in sports, did he have any goal in life after going to college?

A. Oh, yes.

Q. What was it?

Mr. Smith: Again we object, your Honor. We have to object to keep the record straight.

The Court: All right. Overruled.

Mr. Smith: I don't see how hearsay testimony is admissible for any purpose, including what this youngster may have planned.

The Court: I will rule it is not hearsay. The objection is overruled. You may answer.

Q. Did he, you can answer the question, when he got through college what was he going to be?

A. Well, he's always, he was very good in arithmetic and he had always had in mind to be an accountant like, he has an uncle that's an accountant, that's what he had in mind always, arithmetic was his best subject.

Q. Now, how did he get along with his father?

A. Fine, no trouble, ever.

Q. What did he call you?

A. He called me mother, always.

Q. What did he call his own father?

A. He called him either Dad or Don.

Q. And what about Beatrice Heider, that would be what relation to—

A. That would have been his stepmother, he always called her Bede.

Q. He always called her Bede, and how did he get along with her?

[fol. 280] A. Fine.

Q. How far are your two houses apart?

A. Oh, I don't know, some say a block, some say two blocks, in a small town the blocks aren't like the city, probably a block and a half according to the city blocks.

Q. And how often was he over to his dad's house?

A. Oh, it would be every day, back and forth when he could be, from school he'd stop by or in the evening he'd make a run over, if he felt like it.

Q. What about the other Heider children, did they come over to your place?

A. Yes, they come over, they still come every day.

Q. Then as I understand it, you and your husband have never been in any financial need with this boy at all?

Mr. Smith: I object to these as leading questions.

The Court: Yes, I think that question is leading.

Mr. Pillon: I understand it is leading. I just wanted to save a little time.

The Court: Objection sustained.

Q. Did you expect any financial contribution from Jim, James?

A. From Jim?

Q. Yes.

A. You mean after he—

Mr. Smith: I object to that as incompetent, your Honor.

The Court: I would think there would have to be some basis for the question.

Q. Would Jim have been the type of boy to help in any way if, financially, if the need occurred?

A. Oh, I'm sure—

Mr. Smith: Just a minute. I object to that as incompetent.

The Court: Well—

[fol. 281] Mr. Smith: It is hypothetical, it is speculative, there is no foundation.

The Court: Do you have any facts?

Mr. Pillon: Well, I am going to go into it some later on but rather than, I can recall her. I would like to have the answer but if not I will recall her.

The Court: All right.

Mr. Pillon: I have to put in testimony of the doctor to show this boy's natural father has a premature life expectancy. This boy therefore, that being true, the next question that arises, what if anything would this boy have contributed toward helping with the stepmother and his half brother and half sister.

The Court: I don't know what other evidence you can offer but I think it would be confined to any facts which you have.

Heider, Donald, the plaintiff herein, was thereupon called as a witness in his own behalf and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

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[fol. 290] Q. I want to go into a little bit now about James. Now, how often in the last, what type of boy was James, just describe generally what kind of a boy was he, what type?

A. Oh, he was a go-getter.

Q. Was he, you say he was a go-getter. Now, what about his physical condition?

A. He had good physical condition.

Q. What about his mental condition?

A. That was good, too.

Q. How often was he over to your house to visit?

A. About every day, after school and in the evening.

Q. Did you see him frequently?

A. Yes.

Q. Did you ever go hunting or trapping and fishing with him or any of those things?

A. Hunting and fishing.

Q. Hunting and fishing. What kind of hunting would you do?

A. Pheasant hunting.

Q. Where did you go pheasant hunting?

A. Go out to my brother-in-law's farm out in the country, the game reserve.

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[fol. 295] Q. Now, what type of a boy was David?

A. Active, he was—

Q. What about his physical condition?

A. Good physical condition.

Q. What about his mental condition?

A. He had a good mental condition.

Q. Well, what, was he an obedient child?

A. Yes, he was.

• • • • • • •

[fol. 296] Q. Well then tell us specifically about David now, such as the type of boy he was in your household?

A. Well, you never had to ask David to do anything, he was there offering to help.

Q. What else?

A. Well, he always helped his mother around the house, and helped with the other children.

Q. When he was in your house he was the oldest boy then?

A. Yes, he was.

Q. In what way did he help with the other children?

A. Well, helped them dress and take care of them, watch them outside, play with them.

Q. What about James? Tell us some of the characteristics about James?

A. Well, James, he always helped his grandmother. He never had to be asked, he was always there offering to help her, if she needed help or if she wanted anything from the store.

Q. What I am getting at specifically is what if anything did James do in your house with reference to Larry and Linda?

[fol. 297] A. Well, we would go to the store, watch them while we were shopping.

Q. He would baby-sit for you, in other words?

A. Yes.

Q. Now will you describe the house when you would leave it and you would come back, for instance?

A. There was never nothing disturbed, they always minded and they sat there and watched television, nothing was upset.

Q. Was James an obedient boy?

A. Yes, he was.

Q. What about David?

A. He was, too.

Q. Which one would you say was the more aggressive of the two?

A. James.

Q. Did David have any idea of what he wanted to do when he got big?

Mr. Smith: Just a second, your Honor. I object to that as incompetent, to give to this jury hearsay testimony as to what an 8 year old boy is going to do when he gains

maturity as a basis for considering the probability of his son's conduct, I think is completely—

The Court: Well, I think he said he didn't know but in any event I will take the answer. The attorneys may argue the effect of it.

Q. Well, what is your answer?

A. Well, at his age all he wanted to be was a cowboy at the time.

Q. In other words, did you ever take him hunting or fishing or anything of that kind?

A. Yes.

Q. Did you ever take James hunting and fishing?

A. The three of us used to go.

* * * * * * *

[fol. 298] Cross examination.

By Mr. Smith:

* * * * * * *

[fol. 302] Q. Now, on the 14th of April of 1957, David would have been 6 and a half years old?

A. That would be—yes.

Q. His birthday would have been in October?

A. Yes.

Q. And was it at the age of 6½ that he was baby sitting and doing all these things around the house that you testified about?

A. Well, I didn't say David. Jim I said.

Q. I understood you to say that it was David.

A. Well, he would watch them in the house and play with them.

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[fol. 304] Heider, Beatrice, was thereupon called as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

Q. Your name, please?
A. Beatrice Heider.
Q. How old are you?
A. 33.
Q. Your name is Beatrice Heider, is it?
A. Yes.
Q. And you are 33. When did you first marry Donald Heider?
A. December 9, 1949.
Q. And how many children were born?
[fol. 305] A. I have 3.
Q. And what are their names and their ages?
A. Well, there was David, David was 8, Larry was 8 today, or not today but he is 8 years of age, and Larry is 5.
Q. Now, David was your oldest boy, is that it?
A. Yes.
Q. How long have you yourself lived in the community of Sebewaing?
A. All my life.
Q. You were born and raised in Sebewaing?
A. Yes.
Q. And where do you live?
A. I live at 205 Washington Street, in Sebewaing.
Q. And how far is that from David's grandparents?
A. Oh, I'd say a block and a half.
Q. A block and a half. Who was James Heider?
A. James is the son of Donald by his first marriage.
Q. Did James ever live with you?
A. No.
Q. Now, when David was born where you residing at?
A. Lakeville, Michigan.

Q. About how long did you live there?
A. Oh, about three years.
Q. About three years.
A. Yes.
Q. And did you, where did you live after that?
A. Back to Sebewaing.
Q. Back to Sebewaing. Did you go down to Detroit to live?
A. Yes.
Q. And when was that?
A. It's about '53, 1953.
[fol. 306] Q. How long in Detroit?
A. About six months.
Q. And then you came back to what community?
A. Sebewaing.
Q. Now, do you recall the 21st day of December of '58?
A. Yes, I do.
Q. Did you see James at all that day?
A. Yes.
Q. When?
A. Well, it was in the afternoon when the children were coming back from Sunday School practice, he was in the car with his grandmother.
Q. And did you see David that day?
A. Yes.
Q. Now, after what time did they come back from Sunday school?
A. I'd say about a quarter to three in the afternoon.
Q. They were together, David and James came back from Sunday school together, or not?
A. I don't believe they were in Sunday school practice, the other children were but they went to pick the other children up, with the grandparents.
Q. Were David and James or Jim, were they together in choir practice or don't you know?
A. I don't know.
Q. Did they come home together?
A. Well, from Sunday school in the morning, yes, but

I don't know in the afternoon they hadn't been to practice, they didn't have to go to practice.

Q. All right. Now what did, did Jimmy stay at your house that day?

A. Yes.

[fol. 307] Q. David was there?

A. Yes.

Q. What did, what did David do that time?

A. Well, he had been to Sunday School with Larry in the morning and they came home and—

Q. I see. He had been to Sunday School with his younger brother Larry?

A. Yes, and they came home and changed their clothes and then they had lunch and, or dinner, and then David went, asked if he could play with Linda outside, that was his younger sister, she was only about two then, and I said it was pretty cold out but if he dressed her warm he could take her out in the front yard if he watched her and he said he would, so I got Linda dressed and David took her outside and played with her, for about 20 minutes because it was too cold, and then he brought her back in.

Q. Then what did they do?

A. Well, he went outside and played by himself for a while in the yard and then I looked outside and I saw that he was kicking snowballs around outside and I went to the door and asked him what he was doing and he said, "Nothing," and he said, "Can I go to Grandma's," and I said, "Yes."

Q. That's the last time you saw him alive?

A. That's the last I seen of him.

Q. Now, you instructed him about what time to be home?

A. 4:30.

Q. When he didn't come home what did you do?

A. Well, I went over to the neighbor's, I had no phone at the time and I went over to the neighbor's and I called over to the folks' home to see if they were still there and they said they hadn't come back yet.

Q. Why did you tell him to be home at 4:30 that night?

[fol. 308] A. Well, in the evening was their Sunday school program.

Q. Did he participate in that?

A. Yes.

Q. In what way?

A. Oh, he had a little verse to say, I think with a group, a few songs.

Q. I see, and what did you do next?

A. Well, I got supper ready for the other two children, and I made a sandwich for David and laid his clothes out that when he did come back that all I would have to do would be clean him up a little bit and dress him for the program.

Q. When he didn't come back did you go to the program?

A. Yes, I took the little children and I went.

Q. Well, did you stay through the entire program?

A. Yes.

Q. When did you first know that something had happened to your son David?

A. Well, I knew when I, I knew before I left, I didn't know anything had happened but I knew they hadn't come home yet.

Q. Well, what did you do after you came back from Sunday School?

A. I went in the house because he was supposed to be home, when, I expected him to be home when I got home, and I went in the house to see if he was there, I left the light burning for him, and he wasn't in the house, so I came home with my sister from church and I told her she should go on over ahead to the folks' place and see if David is ready to come home and I undressed the other children and got them ready for bed, in the meantime my sister came back and she said that the children weren't home yet [fol. 309] and that I was to bring the other children and to go back over to the folks.

Q. Did you go over to the folks yourself?

A. Yes, I did.

Q. To Herb Heider's and Alma Heider's?

A. Yes.

Q. Donald Heider's father. Then what happened?

A. Well, there wasn't anything definite known at that time.

Q. Well now, what I am getting at is you didn't participate in any of this search or did you?

A. No.

Q. You didn't. All you knew is they came and told you they found the boys?

A. Yes.

Q. All right. Did you—now first of all, about what kind of a boy was David?

A. Oh, he was quiet. He didn't have too much to say.

Q. What were his characteristics as far as his honesty and trustworthiness or anything of that kind?

A. Well, I could trust him.

Q. Was he an obedient child?

A. Yes, he was.

Q. What grade of school was he in?

A. Third.

Q. Third grade. This Exhibit No. 14, does this contain David's third grade school marks?

A. I believe for the first period, yes.

Q. For the first period?

A. Yes.

Q. For December?

A. For December.

[fol. 310] Mr. Pillon: I would like to offer in evidence Plaintiff's Exhibit No. 14, which is a report card of David's school.

Mr. Smith: We don't have any objection.

* * * * * * *

Mr. Pillon: * * * This is the Immanuel Lutheran School, report of David Heider's grades, semester 1, 1958-59, attendance record, school, number of days present 87.

School, number of days 87, present 87; Church services 18, present 16; Religion C; Memory B; Reading B;

Language C; Spelling C; Geography C; Arithmetic C; Science B; Music C; Art C; Handwriting B; Physical Education B; Conduct B; hot lunch paid.

* * * * * * *

[fol. 328] Thursday, February 16, 1961, 9:40 o'clock a.m.

* * * * * * *

HEIDER, HERBERT, a witness on behalf of the plaintiff, was thereupon recalled and having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Pillon:

Q. I just wanted to get a few points clarified. When did you first move to Sebewaing?

A. 1919.

Q. In 1919, were you down in this area where they have got designated on this map a race track?

* * * * * * *

Q. What do you know about there ever being a race track there?

A. There was, years back.

Q. Do you know when?

A. Oh, must have been in the 1800's used to be the fairgrounds.

Q. What fairgrounds, Sebewaing Fairgrounds?

A. Well, I couldn't say to that what they called it, it's a fairgrounds.

Q. It was called the fairgrounds, in 1919. Now, what was built where they have got this picture of a race track here?

A. Well, there's an assembly hall and dining hall and other buildings that they used there for that purpose.

[fol. 329] Q. About how many buildings are there on this area here?

A. What with the cottages or just with the—

Q. With the cottages and everything, this race track?

A. Oh, I would say in the neighborhood of 30 to 40 buildings.

Q. 30 to 40 buildings. Now, before you testified that you didn't or you have testified you have seen hunters along this railroad track?

A. Yes, sir.

Q. Now, did you ever see any other hunters in the area?

A. Yes, sir.

Q. Where did you see them at?

A. Well, they were over on the left hand side of the track.

Q. Were they on, fishing up on the ponds or on the railroad track right-of-way?

A. Well, they were up more to the top of the, where them top ponds are, way beyond that.

Q. Over this way, you mean?

A. No, up on the railroad track.

Q. Why don't you come over here and point to where you see them?

A. They was all the way up to this number five pond, that was all farmland up through in there, and this here, have been all along in there and also on this side is farmland.

Q. All right. Now do you want to go back to the witness chair. While you are here, what is located over in this area here (indicating)?

A. That's all farmland.

Q. This is all farmland. Is there a road over here anywhere?

[fol. 330] A. Yes, that is Rose Island Road.

Q. The Rose Island Road, that runs right down here in this direction?

A. That's right.

Q. And if you park your car and you want to go over onto this property, is this land so you can walk across it or not?

A. Yes.

Q. Now, is there a road going down this side of the property?

A. Yes, sir.

Q. That is the north side of the property there. What is the other side of this number 6 pond?

A. There is some more farmland in there.

Q. Some more farmland, and any buildings on there?

A. Yes. There's a fellow in there he has got a home on there and he rents boats.

Q. He rents boats, and can you walk across that land onto this—

A. Drive in there.

Q. You can drive in there?

A. Yes, sir.

Q. Where are his boats launched from?

A. Out of the cut.

Q. What do you mean, out of this—is this what you call a cut here?

A. No, there's a cut up a little further, right about up in there, that last pond.

Q. The other side of this pond is a cut?

A. Yes.

Q. Now, it goes out into the bay?

A. Yes.

Q. How far in does it come?

A. Well, it comes up to his property, where he has his boat tied.

[fol. 331] Q. I understand, and you can drive right into the cut, is that it?

A. Right up to his place, yes.

Q. You can walk across that, around that?

* * * * * * *

Q. How do you get from the road over to pond number 6?

A. Well, if it is froze, if that cut is froze you can walk right across it.

Q. If it is not frozen how would you get across it?

A. You will have to wade across.

Q. You would have to wade across. In other words, how far up does this cut come there?

A. From the road?

Q. From the, from Saginaw Bay going eastward, how far up does that cut come?

A. Well, it runs up there a couple of miles.

Q. A couple of miles?

A. There's a drain ditch.

Q. There's a drain ditch, about how wide is it?

A. Oh, I should say it is 12 to 15 feet.

Q. You said the next day that you were out to the scene of this tragedy, is that right?

A. Yes, sir.

Q. Now, how long a period of time where you there?

A. Oh, probably about an hour.

* * * * * * *

Q. Now, Plaintiff's Exhibit No. 1 shows the area, any different than when you saw it?

A. Oh, yes, it was all broken up on this picture.

Mr. Smith: What is Plaintiff's Exhibit No. 1?

Q. Well, it's, it is the photograph. Now, what is different about that picture there from what you saw when you were there?

[fol. 332] A. The night before or the—

Q. No, the next day.

A. Well, all that slush and ice that they broke off, they put a telephone pole across there and drug all that slush and ice over to the north.

Q. So it doesn't appear in the picture?

A. No. Well, part of it down here, it is the same slush.

Q. Now, we have in evidence when you were on the stand, Plaintiff's Exhibit No. 9. Now, I want you to—when you were there that when you were there that night, you as I recall it testified that you had seen the hole, is that right?

A. Yes, sir.

Q. Now, I want you to take a pencil and put on Exhibit No. 9 where you saw the boat and put your initial by it, you don't have the same initials as any of the others—

A. No. Should I mark it around or right around there or how?

Q. I don't understand what you mean.

A. Shall I mark it round or how?

Q. Mark it where you remember the, put your initial so we will know. Were there any other holes of any kind that you saw there other than those two holes that you circled?

A. No, sir.

Q. And one other thing. On this Exhibit No. 1, could you identify this object that is in the foreground so there won't be any question?

A. Yes, that's our dog.

Q. That's your dog?

A. Yes.

Q. What kind of a dog was he?

A. Cocker spaniel.

[fol. 333] Cross examination.

By Mr. Smith:

Q. Mr. Heider, when was it that you were pheasant hunting that you told us about?

A. When?

Q. Yes, sir.

A. Plenty of times.

Q. Well, plenty of times is a little indefinite. When, do you recall? What year was it that you recall having gone pheasant hunting along the rairoad tracks here?

A. Oh, it must have been, I went down in '56, '57, '58 and '59.

Q. And that you say was when you went along the railroad tracks pheasant hunting?

A. Yes, sir.

Q. The farmland that you are talking about to the north of the Sugar Company is an open country area for several miles, isn't it?

A. Which, to the northeast or right direct north?

Q. To the north of the Michigan Sugar Company property?

A. Yes.

Q. And to the east of the Michigan Sugar Company's property, is that farmland, too, isn't it?

A. That's right.

Q. And that extends out—

A. For miles.

Q. For miles. Now, you have talked about a man who had a boat livery on the north?

A. Yes.

Q. That boat livery isn't on the Michigan Sugar Company's property, is it?

A. No, I didn't say it was.

[fol. 334] Q. I am making it clear because you didn't say whether it was or it wasn't.

A. No.

Q. Now, the launching spot where the boats are launched by the man who has the boat livery up there, that isn't on the Michigan Sugar Company's property, either, is it?

A. No, sir.

Q. You talk about people walking across to the Bay short from this farmland. If people walked across they would have to trespass on the Michigan Sugar Company property, would they not?

A. No, sir.

Q. Unless they stayed to the north of it?

A. Yes.

Q. What are these buildings that are down in what you say was the old race track area?

A. What buildings?

Q. What are the buildings that you told us about?

A. Well, they have their church, they have their assembly hall there, they have their dining hall and it is also a hotel combined where, when they have their church assembly meetings, people congregate there.

Q. Well, that assembly area, that is only operated in the summer, isn't it?

A. That's right.

Q. There isn't anybody there in the winter?

A. Yes, there's a caretaker on the property.

Q. But no, they don't have very many assemblies out there in the winter time?

A. No.

Q. They don't have any?

A. Not that I know of.

Q. Sir?

A Not that I know of.

[fol. 335] Q. So that all that you know of out by way of habitation in the race track area in the winter time is a caretaker?

A. That's right.

Q. When does the pheasant season end?

A. Well, you only have 15 days in October.

Q. In October, that's all.

Mr. Pillon: The plaintiff will call for cross examination Mr. Max Meissner.

I would like the Court to instruct the jury I am calling this witness for the purpose of cross examination under the statute, that he is employed by the defendant sugar company, I am calling him under the statute.

The Court: All right. Go ahead.

MEISSNER, MAX, was thereupon called as a witness on behalf of the plaintiff (under the statute for cross examination) and having been first duly sworn, testified as follows:

Cross examination.

By Mr. Pillon:

Q. Your name is?
A. Max Meissner.
Q. You live where?
A. Sebewaing.
Q. Whereabout in Sebewaing?
A. East Sebewaing Street.
Q. And you are employed by?
A. Michigan Sugar Company.
Q. How long?
A. About 30 years.
Q. Do you work all year around for them?
A. I do.
[fol. 336] Q. And what are your duties there?
A. Truck driver, also dike patrol.
Q. You are a truck driver, and what do you do, deliver items or what do you do with the truck around Sebewaing?
A. Oh, we haul repair parts and so on for the plant.
Q. Do you have any other duties?
A. Oh, nothing outside of dike patrol.
Q. Dike patrol.
A. That is during campaign period.
Q. During campaign period, when does the campaign start?
A. Generally about October.
Q. I mean, that is when you first start cutting up sugar beets?
A. Yes.
Q. And when does it last, until, generally?
A. All that depends on the season.
Q. Depends upon the sugar beets they have done, just—

A. Right, probably runs until February, sometimes in March.

Q. And in 1958, it went beyond December, didn't it?

A. It did.

Q. Now what do you do as far as your duties are concerned in relation to the patrolling of the dikes?

A. See that the pumps are in operation, and the water is transferred to the proper pond areas, no leaks, that's all that covers.

Q. In other words, how do you get onto the dikes?

A. From the south end of pond number 4, through the Bay Shore Park area.

Q. Through the Bay Shore Park area, you drive up onto the dike, is that it, and by the dikes you mean the ponds?

[fol. 337] A. That's right.

Q. And around each pond there are roadways?

A. You can drive right up on top of them, yes.

Q. And how often do you go around?

A. That depends on the conditions, sometimes at least once a day.

* * * * * * *

Q. And sometimes I presume you go oftener than that?

A. That's right.

Q. It depends upon conditions?

A. That's right.

Q. Now, while you are at the ponds in 1958, did you see any evidence of trappers at the ponds?

A. No, I can't say that I did.

Q. I see. Do you know Mr. Yahr?

A. Yes.

Q. You do. Who is Mr. Yahr?

A. Who is he?

Q. Yes. Is he an employee of the Michigan Sugar Company?

A. He is a part time employee, yes, during the campaign.

Q. During the campaign. Does he trap up in there?

A. He traps in that shore line area as far as I know.

Q. How do you know?

A. Just from what he tells me.

Q. Do you remember that I was over to your plant I believe it was in September of last year, did you see me there?

A. I did.

Q. And who else was present? Mr. Heider, Donald Heider, he was present.

A. Yes.

Q. Was the plant manager there?

[fol. 338] A. Yes, sir.

Q. What is his name?

A. Mr. Buckley.

Q. And who else was present?

A. Mr. Coonier.

Q. And was there some other attorney there?

A. I believe there was, I wouldn't be quite sure on that.

Q. Do you know how trappers mark their traps?

A. I do.

Q. How?

A. Flags.

Q. Flags?

A. And they should be tagged.

Q. By a flag, you mean they put a stick in the ground and tie a rag?

A. Yes.

Q. You have seen those flags and rags up there?

A. Have we seen them through there?

Q. Have you seen them?

A. Yes.

Mr. Smith: Just a second. When you say up there, where do you mean? Are you asking up on the Michigan Sugar Company property or—

Q. On the Michigan Sugar Company property, have you seen them?

A. Yes.

Q. You have seen the stakes with tags on them?

A. Yes.

Q. Now, do you know what particular color Mr. Yahr uses?

A. No, I don't.

Q. Did you see those units, those, what we call them, marking units with the rags on, those flags, did you see those there in 1956?

[fol. 339] A. Yes, I did.

Q. 1957?

A. Yes.

Q. 1958?

(Witness nods head.)

Q. 1959?

A. Yes.

Q. Now as a matter of fact, you can tell by looking at them that there was more than one person setting those traps, couldn't you?

A. Well, I wouldn't say that.

Q. Did you know that there was more than one person setting traps up there?

A. Yes.

Q. And you knew this in the year, for the year 1956?

A. That's right.

Q. 1957, 1958, and 1958, didn't you?

A. I did.

Q. Have you seen hunters up there?

A. Yes, I have.

Q. How many hunters have you seen up there?

A. I seen quite a lot of them through that area.

Mr. Smith: Will you specify when you ask these questions where—

Q. On the Michigan Sugar Company property?

Mr. Smith: You know Huron County is full of hunters, Bad Axe, Unionville, when I used to hunt up there.

Q. Up there on the ponds.

Mr. Smith: Well, it doesn't necessarily mean on the ponds, either.

The Court: I think you should specify.

Q. Have you ever seen hunters along the railroad tracks?

A. I have.

[fol. 340] Q. Have you ever seen them up on top of the dikes?

A. That's right, I have.

Q. Have you ever seen them here around number four pond?

A. Yes.

Q. And have you seen them around number 3 pond?

A. Yes, sir.

Q. Around number 5 pond and around number 6 pond?

The Court: Will you answer out loud, please?

A. Yes.

Q. What did you do when you see a hunter there, up there?

A. Well, that depends on where I am at, when I see them.

Q. All right. Well, tell us what you mean by that?

A. Well, it isn't just too often that you get that close to them to do anything.

Q. In other words, what were you going to say? When you do get close to them?

A. If you do see them you do see them across the pond but generally by the time you get around that way, they're gone, you don't see them.

Q. Well, I want—

A. When I get close enough to talk to them then—

Q. I didn't hear you.

A. I say you don't too often get close enough to talk to them.

Q. But when you do get close enough to talk to these hunters, what do you do, wave at them, talk to them, ask them what time of day or what do you do?

A. It depends on the location. I have asked them to leave the premises, that they are trespassing.

[fol. 341] Q. Has there ever been occasion whenever you left and didn't ask them to leave the premises?

A. Oh, yes.

Q. Did you understand my question, I say were there ever occasions when you did not ask them to leave the premises?

A. That's right, I did.

Q. There were occasions then. All right. Now, did you ever see any traps set along the railroad tracks?

Mr. Smith: I object to that, your Honor, as immaterial and incompetent.

Q. In the year, to be more specific, in the year '56 and '57, '58 or '59, did you ever see any traps or the flags along the railroad track, between the railroad track and the top of the bank of the pond number three?

A. Yes, I did.

Mr. Smith: I renew my objection, your Honor, and ask that the answer be stricken.

Mr. Pillon: I think it is material.

The Court: He may answer.

A. I did.

Q. You did. Have you ever seen any of these flags up in around the edge of pond number 5, in the year 1957 or '8 or '9?

A. I did.

Q. And around pond number 3, in '57, '8 or '9?

A. Yes.

Q. Do you know when trapping season is?

A. Pardon?

Q. Do you know when the trapping season is?

A. Yes, I do. It starts right after hunting season.

Q. Starts right after the hunting season. So that from some, from the beginning of the hunting season to the end of trapping season, would you say that practically every [fol. 342] day there is somebody trespassing on this land?

A. Well, that I wouldn't say.

Q. Well, how often would you say, from the beginning of hunting season until the end of trapping season, give us your best estimate of how often do you see people up here?

Mr. Smith: Would you indicate what you mean when you say up here?

Q. Well, up on the pond area around ponds 3, 4, 5 or 6, or 1 or 2, for that matter?

A. You said around—

Q. Along the railroad track.

A. You said around the ponds?

Q. What I am saying is, how often have you seen people from the beginning of hunting season to the end of trapping season, hunting and trapping on your land, on the Michigan Sugar Company's property, either at or near pond 1, 2, 3, 4, 5, or 6, or along the railroad tracks, during the year 1957, 1958, and 1959?

Mr. Smith: I object to that again, your Honor, as incompetent and immaterial.

Mr. Pillon: I think it is very material.

The Court: Yes, I will take the answer.

Mr. Smith: You see, the reason for my objection, your Honor, is that—

The Court: You mean—all right.

Mr. Smith: Is that the fact that there may have been hunters on these premises is immaterial insofar as the issue in this case is concerned. There is a different measure of responsibility, there is a different measure of liability, and one has no relation to the other.

[fol. 343] The Court: It is all a matter of argument. I think you may bring out this evidence as to the nature of the circumstances involved. You are asking after this accident or not?

Mr. Pillon: I am asking during the year, I asked specifically by years, approximately how many persons or how often he saw persons there, whether he saw them every day or what, in the year 1957, the year '58, the year '59.

The Court: Well, I don't know what '59 would have to do with it but if you don't object to that—

Mr. Smith: I object to all of it. Of course '59 is completely incompetent.

The Court: I can see how that portion of it—

Mr. Pillon: We will take the year 1957 first.

Q. About how often have you seen people, just give us some idea, whether it was daily or weekly or what or how many people—

Mr. Smith: Just a second, your Honor. Again I object to this unless we specify some time.

The Court: All right.

Mr. Pillon: I am going to.

The Court: All right.

Mr. Pillon: Just give me a chance to ask the question.

Q. From the beginning of hunting season—

Mr. Smith: You have asked the question.

Q. —to the end—

The Court: As modified or I assume it will be, it would be admissible over the objection. Now will you restate your question and make it applicable, taking into consideration the comments already made.

Q. We will start with the year, say the year 1956 first, we will take it year by year. In the year 1956, can you give us an estimate of either, of how often you saw people that [fol. 344] were trespassing upon this land, by this land I mean—

Mr. Smith: Just a second. I object to that, your Honor. Unless he testified that he knew they were trespassing, his testimony is completely immaterial and incompetent.

The Court: Well, he is asking how many he saw trespassing. Now I assume that he—what you know to be the defendants' property.

All right. Start again.

Q. The question is in the year 1956—

Mr. Smith: Now just a second. So I'll make my objection clear—

The Court: All right.

Mr. Smith: There might have been a thousand people on this property, all of whom, with permission of the owner, all of them guests of the owner, and to have this man asking a question which assumes that anybody he saw on those premises were trespassers is to prejudice the case and to put into evidence something that this man may know nothing about at all, that's my objection to it.

Q. Did all the hunters and all the trappers have permission from the Michigan Sugar Company to go on this land at any time they wanted?

A. They did not.

Q. Now, take the year specifically of 1956, how often did you see from the beginning of the hunting season to the end of the trapping season, people that were on the Michigan Sugar property, on the Michigan Sugar property, either on around ponds 1, 2, 3, 4, 5, and 6, or were along the edge of the railroad tracks, that were there without permission?

Mr. Smith: There again, your Honor, I object to that, this man wouldn't know.

[fol. 345] The Court: I don't know whether he knows or not. He may answer.

Mr. Smith: Well, before his evidence is competent somebody ought to know and that is why I object to it.

The Court: All right. Will you clarify it?

Q. Well, now I will give you the same question again except at the end of it I will say, without permission, and that's the only thing I can say because I don't know—

The Court: Well, ask him if he would know, how would he know, whether they had permission.

Mr. Pillon: I asked him did any of these people have permission of the Michigan Sugar Company, he said no.

Mr. Smith: No, your Honor, he said no such thing. I'll tell you what he said.

The Court: What did he say?

Mr. Smith: You asked him if all the hunters that were on the premises had permission, that's what you asked him.

The Court: All right. Let's get it clear, then go ahead with your question. Lay the foundation.

Q. Did the Michigan Sugar Company give permission to people to hunt or trap on their land?

A. They did, yes, to some.

Q. To some, and did they inform you who they were?

A. Well, I knew a couple, yes.

Q. You knew a couple. Now, when you told people to get off that land on some occasions, why did you tell them to get off?

A. Just reminded them they were trespassing, get close enough to them to tell them something.

Q. You saw some other occasions that there was people on there and you didn't tell them to get off?

[fol. 346] A. That's right.

Q. Why?

A. Well, it depended on the location.

Q. Depended upon the location?

A. That's right.

Q. Well, why, I don't understand.

A. Well, it would be outside of number four pond where your marsh area starts as far as hunting area, that is your duck hunting are. I wouldn't say anything to them because they use that as a roadway to get out there, and they were merely walking up on there because it is easier walking than it would be out in the rushes.

Q. In other words, if you saw them along the shoreline here, you never said very much to them, is that right?

A. No, I wouldn't.

Q. But if you saw them back in here somewhere—

A. That's right.

Q. You would say something to them if you got that close to them?

A. That's right.

Q. Now, you say there were some people who you knew about that had permission, is that correct?

A. That's right.

Q. Now, how many people in the year 1956 from the beginning of the hunting season to the end of the trapping season, who didn't have permission to be upon these premises around ponds 1, 2, 3, 4, 5, and 6, did you see? Give us some idea?

A. I wouldn't know whether they had permission or not to my knowledge at that time.

Q. Well, how many people did you see up there during 1956?

[fol. 347] A. Well, possibly, I wouldn't say how many people you saw but you see them up there a couple of times a week, I would say.

Q. Well, how many people would you see there at a time, generally?

A. Well, during early hunting season, you would see as high as 30, 40 people around that whole area.

Q. During hunting season you would see 30 or 40 people?

A. That's right.

Q. And later on you would see a lesser number, is that it?

A. That's right.

Q. Did you ever see children hunting or trapping?

A. I have not.

Q. I didn't hear you?

A. I have not.

Q. You have not. And you don't know the name of all the people that trapped on this land, do you?

A. No.

Q. I didn't hear you.

A. No.

Q. Well, now, we have got through 1956. In 1957 what is your estimate?

A. I would say it would be about the same.

Q. What about 1958?

A. About the same.

Q. About the same. Did you ever hunt and trap up there yourself?

A. I did hunt, yes, around the area.

Q. Can you give us an idea of how many trappers trapped on this area?

A. No, I couldn't.

[fol. 348] Q. But you know that more than one, don't you?

A. Yes.

Q. There were several?

A. I wouldn't want to say as to just how many, it would be pretty hard to say.

Q. Pretty hard to say. Did you ever see any traps with the rats in them?

A. I have, yes.

Q. And this would apply in the year 1957 and 1958?

A. I would say yes.

Q. Did you ever see any traps with mink in them?

A. Yes, I have.

Q. Where were the traps generally set?

A. In pond number two, to the far north end.

Q. To the far north end of pond number two?

A. That would be a little further again.

Q. A little further?

A. Yes, it would be right up in that area.

Q. That's where most of them were—

A. That is one of my stopping points.

Q. That is one of your stopping points, and that's how you happened to particularly notice the traps with the animals in them and as you say, it is a stopping point for you. Is there a road over here?

A. No, I drive up on the dike.

Q. You drive up on the dike along pond number two, is that it?

A. That's right.

Q. I see. Oh, and why do you stop up near that end?

A. The State has a weir gague in there.

Q. A what?

A. The State has a weir gauge in there.

Q. A weir gauge, what is a weir gauge?

A. That is a discharge of water, a measurement of the water going out, being discharged into our drain ditch along the Bay area.

[fol. 349] Q. They have a gauge here, the State of Michigan, that measures the water that comes out from the factory, is that it?

A. That's it.

Q. That is going out into the Bay area. Now, during the winter months, does this, this drain out into the Bay?

A. No, they do not.

Q. They do not. You store the, whatever this liquid is, in these ponds then, during the winter months, is that it?

A. That's right.

Q. The material that goes into the ponds are what you use in the plant and then it comes out of the plant and goes into the ponds?

A. Yes, sir.

Q. Do you know why, the reason why they store it?

A. Well, it has something to do with the lack of oxygen through the processing.

Q. Something to do with the lack of oxygen in processing, does that have some effect upon the life of the fish or something?

A. It does to an extent, yes.

Q. Well, do you know where this, you don't have to draw anything going out this way but there is a, what do you call that, your intake pipe, you have got a canal that goes out there?

A. Yes.

Q. And this is where you bring water in, is that it?

A. Yes.

Q. Do you have any instructions from, who is the plant manager at your plant?

A. Mr. Buckley.

Q. Mr. Buckley. Do you have any instructions from him what to do when you see hunters or trappers out there?

[fol. 350] A. Well, we have been informed to remind them that they are trespassing, yes.

Q. As a matter of actual fact, don't you put up some little signs that say something about trespassing on—

A. No, it's posted.

Q. It is posted. In the year 1957, you posted it, didn't you?

A. 1956?

Yes.

Q. And in 1958?

A. Yes.

Q. And when do you put these signs up?

A. Twice a year.

Q. Twice a year, and when it that?

A. Generally in the spring and in the fall, just about the time the hunting season opens.

Q. Well, why do you put them up again in the fall?

A. Well, there are paper signs and the earlier ones sometimes they are removed, you replace those that are missing.

Q. Well, now you put them, these are just paper signs, is that right?

A. That's right.

Q. By paper you mean little cardboard signs of some type, is that right?

A. That's right.

Q. And you put them up in the springtime and then again in the fall. About when in the springtime do you put them up?

A. Right after the weather is favorable so that you can get around in the area pretty good.

Q. In other words, after spring thaw, is that it?

A. That's right.

Q. That would be generally what month, would it be June or May or April, I don't have any idea.

[fol. 351] A. I'd say possibly along about May and June.

Q. May and June you put some signs up?

A. Yes.

Q. And then when do you put signs up again?

A. About October.

Q. About October?

A. Yes.

Q. That is the beginning of the hunting season. Now you find, in other words, you find that the matter of four months after you first post some of these signs that they have to be replaced because of the elements, is that right?

A. That's right.

Q. Now, you have a, on the map here there's a pipe line that runs from what it says line pond number 1 into pond number 3, is there such a pipe line?

A. There is.

Q. There is. What function do you have in relation to that pipe line?

A. Pardon?

Q. What do you do in connection with that pipe line?

A. Nothing with that.

Q. You do nothing with that?

A. No.

Q. You never stopped then to see if there is any pipe or trap set along near this pipe line, have you?

A. I do stop there, yes.

Q. Have you noticed the trap set along on either side the embankment?

A. Yes.

Q. Of pond number 3?

A. Yes.

Q. By the pipe line, you have noticed that?

A. Yes, sir, on the railroad side.

[fol. 352] Q. On the railroad side?

A. That's right.

Q. You have seen them in 1957, would you say you saw them in there?

A. Yes, I would.

Q. And 58?

A. Yes.

Q. Along the railroad side?

A. That's right.

Q. They would be set in the embankment that as I understand it, this is sort of like a, it was a pond, as I understand it, would be set down by the track?

A. They would be set right between the track, there's a ditch—

Q. There's a ditch through there, and which side of the ditch would that be set on?

A. That I couldn't say, I never did, I have seen the markers there.

Q. You have seen you mean the flag?

A. That's right.

Q. The piece of stick with the rags on, I see. Now, you say there is a canal along the railroad track. Does it go all the way up alongside pond number 3 or does it turn and go west, south of pond number 3, this is north up here. In other words, this pond come along, I mean; this canal comes along the railroad track and it turns here or does it still go along this way past the pipe line?

A. It goes past the pipe line down to the far point of number 3.

Q. There's a canal that goes all the way along here all the way up to the point the end of number 3 pond?

A. Just a small drain.

[fol. 353] Q. Just a small drain ditch. In other words, does it turn, does it turn and have a branch that goes to the west end?

A. No, I don't believe it does.

Q. You don't believe it does. Across the railroad track, where this pipe line is at, approximately in this vicinity, is there some telegraph pole over there?

A. There is.

Q. There is. Do you post a sign on that telegraph pole?

A. I did.

Q. That's one of your customary places to post it?

A. Yes.

Q. In fact, you don't post signs along the railroad right-of-way do you?

A. No.

Q. And in 1957 and in 1958, you had no signs posted from the road going along the railroad toward up onto pond number 3, there were no signs anybody could see except the one that you had posted over here on the phone pole, isn't that correct?

A. We did have some on the east side of the track.

Q. That's on the east side of the track?

A. Yes.

Q. On this side. In other words, there is a phone pole, is there just a bare pole or is there something on the phone pole?

A. Well, there's a power line, yes.

. . . . . .

Q. How many poles are there?

A. Two.

Q. There are two poles. Are they both telephone poles or telegraph poles or—

A. Both power-lines.

[fol. 354] Q. They are both power line poles. So that if a person came to the road and walked along the railroad track and went up over the edge of pond number 3 there, the only sign that he could see if it was up, the only sign near this place, would be over on this pole over here?

A. No.

Q. All right. Now where else did you put up a sign?

A. We generally have a sign right up on the corner of pond number 3.

Q. You say generally. Now I would like the specific place.

A. Well, I mean to replace that, that sign there, that's one of our signs that some of our trespassers keep removing.

Q. Trespassers keep removing it, you say you have a sign whereabouts on—

A. Right on the corner of number 3.

Q. You say on this corner right here. Well, how, you say trespassers keep removing it, is that it?

A. Yes.

Q. How do they remove it?

A. They just pull it up out of the ground and you generally find it laying in the vegetation.

Q. I see. Do you know whether in the year 1957, you actually put a sign up there?

A. Yes, that was posted.

Q. I see. And in 1958, did you actually put a sign up?

A. Yes.

Q. At the southwest corner. Was that sign still up at the end of the first week of hunting season in 1958, or don't you know?

A. I don't know.

Q. You don't know. All right. Well now, do you have any kind of a sign where the water, at or near the water, overflow pipe where the water comes in to pond number [fol. 355] 3 did you have any kind of a warning sign saying "danger" or anything of that kind, in 1958?

A. No.

The Court: I think we will take a recess at this time.

(Recess.)

Q. Now, where that channel goes out to the, out into the Bay, do you know whether or not you have seen people launching their boats there in the year '57 and '58?

A. Yes.

Q. Now, is there right near the beginning of this channel, a little house?

A. There is.

Q. What kind of a house is that?

A. Just an intake house.

Q. An intake house?

A. With screens around the inside of that.

Q. And do you have a fence around it?

A. We do.

Q. You do. Why?

A. Well, there's a sharp dropoff, it is walled in and there is quite a drop to the water line, that's from ground level to the water line.

Q. I didn't hear you.

A. There is a quite a drop from the water line to the, that is from the ground level to the water line.

Q. That's why you have it fenced in there, all right. Now do you know a fellow named Floyd Taylor, they call him Bugs Taylor?

A. Yes.

Q. You do. Did you ever see him trapping up on your land, not on your land, on Michigan Sugar property land, anywhere?

A. Yes, I've seen him up there.

[fol. 356] Q. You have. In relation to where have you seen him at? In 1957 and 1958, in '58 where did you see him?

A. I believe I saw him right in the area of our diversion pump.

Q. Where is your diversion pump located?

A. That would be right where it crosses the track, that pipe line, right in here, right to the east in there.

Q. Did he have his son with him? What is his son's name? Do you know the son's name?

A. No, I don't.

Q. Did he have a child with him or some boy with him?

A. I couldn't say.

Q. Have you ever seen his son or a boy setting traps—

A. No.

Q. —On the Michigan Sugar Company property?

A. No.

Q. How many times did you see Bugs Taylor in 1958 anywhere on Michigan Sugar Company's property that would be around either ponds 1, 2, 3, 4, 5, or 6?

A. I wouldn't say.

Q. Did you see him more than once?

A. Possible.

Q. What did you do when you saw him there?

A. I don't think I did anything.

Q. You didn't do anything. Was he one of the town folk that you knew?

A. That's right, I did know him.

Q. Is that the reason why you didn't tell him to get off the property?

A. No.

Q. You just didn't do anything?

A. If I am not mistaken, he was walking in a direct line toward the railroad track which I took it for granted he was probably just going into the area, he was carrying a gun.

[fol. 357] Q. He was carrying a gun in that area. Did you ever know whether or not he set any traps in there?

A. No.

Q. Either he or his son?

A. No.

Q. You don't. All right. Now let me ask you one more question, a few more questions. At any time in the year 1958 or '57 or '56, did you ever confiscate any traps?

A. No.

Q. You saw the traps but never picked them up and took them back to the company at any time?

A. No.

Q. In those years?

A. No.

Q. Did you have any instructions from the plant manager or anybody else to take the traps, to look for traps and to take, confiscate them?

A. No.

Q. You didn't. As a matter of actual fact, trapping was an advantage to the Michigan Sugar Company, wasn't it?

Mr. Smith: Just a second. I don't know whether this gentleman is authorized to speak for the Michigan Sugar Company on the question of trapping, until he has such authority established I would think it is incompetent.

Mr. Pillon: We will work at it a different way.

The Court: All right.

Q. Did the muskrats or the mink ever do any damage to any of these ponds up here?

A. They do.

Q. What type of damage do they do?

A. They burrow into the dikes and create leaks.

Q. They burrow into the dikes and create leaks?

A. That's right, they cause leaks.

[fol. 358] Q. You mean a big mound is this or was this in 1958?

A. I'd say it has been about 8 foot high.

Q. About 8 foot high.

A. Possibly in that neighborhood.

Q. And about how wide across?

A. I would say about 12 foot.

Q. You mean that they would burrow through that and cause leakage?

A. They don't burrow through, they burrow into them possibly about 8 or 10 feet which creates a seepage, the pressure from your water line starts seeping through.

Q. I see. Now one thing more in relation to pond number 3. In the center of it or center portion of it, is there some type of a built up area more or less like an island?

A. There is.

Q. There is, and would you come down here and draw that in for us? You just sort of draw it in as you know, pond number 3?

(Witness draws on the blackboard.)

Q. Something along that shape, and what is on this island-like affair?

A. Vegetation and undergrowth.

Q. Vegetation and undergrowth. In other words, are these ponds generally clear in the springtime?

A. They are.

Q. They are. Then you do dredging work in them and throw dirt up onto the center island and out to the bank?

A. Only when it is necessary for repairs, where they would wash down.

Q. Well, how high is this island-like area in pond number 3 in relation to your roadway over here?

A. Well, that would be below the roadway level.

[fol. 359] Q. Below the roadway level?

A. Yes.

The Court: Well, how high up with regard to the water.

Q. That is what I was going to get to. Now with regard to the water in 1958, did any of your island stick up above the water?

A. Yes, during the summer.

Q. I want to show you Plaintiff's Exhibit No. 1 and ask you if you can see any part of the island in pond number 1?

A. Yes.

Q. Up on the edge in the corner?

A. Yes.

Q. And I will show you picture number 9, exhibit number 9, and the water intake pipe being down at the south end of the picture, can you see any part of the island sticking up?

A. Yes.

Q. The whole area across the top where the men are, this man over here is standing right on the island, is that it?

A. Yes.

Q. So that these pictures taken on December the 21st or 22nd or 23rd of 1958, at that time the island was up above the level of the water?

A. Yes.

Q. How far down from the top of the road is this, was the intake pipe in 1958?

A. I would say about four foot.

Q. About four foot. Well, when this sign was, that you say that you posted on the southeast corner of pond number 3, which bank did you put it on, the bank toward the railroad side or the bank toward the pond side?

[fol. 360] A. Toward the railroad side.

Q. Toward the railroad side?

A. The outside of the dike.

Q. After you discovered that in 1958, when the sign was down, did you do anything about putting it back up?

A. Yes, when I made our regular run, it was replaced.

Q. I see. What do you mean regular run, you mean twice a year?

A. Well, we check all our signs twice a year, yes, if they need replacing, why, we replace them.

Q. So that if this sign was taken down a week after it was up or a day after it was up or a month after it was up, whether it was thrown in the vegetation or completely destroyed, you wouldn't put another sign up there until you made your rounds the following spring, is that it?

A. No, you see we don't run those dikes the year round.

Q. The question is, in October of 1958, first of all, do you remember definitely whether you put a sign there or not?

A. There was a sign there, yes.

Q. And you don't know how long it was up?

A. No, I do not.

Q. And you never replaced it in 1958?

A. I don't recall.

Q. Well, your, what happens to the signs other than they get weather-beaten and they get taken down, anything else happen to them?

A. Yes, they do at the point of, our number four, our entrance there.

Q. I mean what happens to these signs other than being weather-beaten and taken down, anything else happen to them?

[fol. 361] A. There have been places where they have been shot down, target practice.

Q. The hunters use them for target practice, is that it?

A. Yes.

Q. You have seen the signs with holes in them, is that it?

A. That's right.

* * * * * * *

Cross examination.

By Mr. Smith:

Q. Mr. Meissner, how long have you been employed by the Michigan Sugar Company?

A. 30 years.

Q. Do I understand that you drive these dikes every day during the campaign?

A. I do.

Q. Now, what about when the compaign isn't on?

A. Yes, we drive those dikes—

Q. Now are you talking about you or we? When you say we, that might be 20 people. I am talking about you, how often do you drive them?

A. I drive them once a day.

Q. Once a day, and is that the year around?

A. No.

Q. When do you drive them then, during what season?

A. As long as there is water in the ponds.

Q. Well, when is that? Is that winter or summer or during—

A. It is during the winter and early spring.

Q. The fact of the matter is that the ponds begin to accumulate water in them when the factory begins to run, isn't that right?

[fol. 362] A. Yes.

Q. Because they are drained every summer, every spring, aren't they?

A. They are.

* * * * * * *

By Mr. Smith (Continuing):

Q. To go back to my question, sir, the fact is that the ponds are drained every spring, aren't they?

A. Yes.

Q. And it is only in the fall when the factory begins to run that any water is replaced in the ponds, is that correct?

A. That's right.

Q. Now, you tell me when it is that the factory started to run in 1958?

A. Well, October.

Q. When in October?

A. The first week in October.

Q. Now then, where is the water first, what ponds are first used for the water when you begin to run the plant in the fall?

A. Number 2 line pond.

Q. All right, number 2 lime pond is way over to the east of the map, is it not?

A. Well, number 1 is also used.

Q. Well, which one did they use first in 1958?

A. Number 1.

Q. All right. Now, that's where the water first goes. Are any of the other ponds used at the same time in 1958?

A. Mud pond.

Q. Where is the mud pond?

A. Down in the lower end.

. . . . . .

[fol. 363] Q. At any rate, so that everybody will be satisfied, you say this mud pond was used in the fall of 1958?

A. Yes.

Q. Now, was that used at the same time as lime pond number 2?

A. Not, lime pond number 1.

Q. Lime pond number 1.

A. That's it, right there.

Q. What I am trying to find out, sir, is when was water first started to accumulate in pond number 3 in 1958?

A. I would say long about the first of November.

Q. That's when you first began to get any water in it. Now, when is the pheasant season when you saw these hunters around about in the area that you told us about in 1958?

A. October.

Q. When does it close?

A. I would say 15 days later.

Q. It closes in—

A. October.

Q. Around the first of November, doesn't it, or the 15th? I think it is the first of November that it closes, but anyway, what I am getting at is this, pheasant season is all done by the 15th of November, isn't it?

A. It is.

Q. And by the 15th of November you have practically no water in any of these ponds except lime pond number 2 and the mud pond, is that right?

A. That's right.

Q. No question about it, is there? Now, when does this pond start to freeze over?

A. I believe in '58, it started long about the first week of December.

[fol. 364] Q. Along about the first week of December?

A. Yes.

Q. There weren't very many pheasant hunters wandering around out there at that time, were there?

A. No.

Q. Now, I want to go into December of 1958, and ask you some questions about the trappers that you saw. You mentioned the name of one, Bugs somebody—

Mr. Pillon: Taylor.

Q. Bugs Taylor, you remember him, that you saw him. Now you tell me any other trappers whose name you know of that you saw out there in 1958 at all, at any time?

A. Mr. Jahr.

Q. Mr. Jahr had permission to trap there, didn't he?

* * * * * * *

A. That I wouldn't know.

Q. You wouldn't know. You heard him testify the other day or did you?

Mr. Pillon: He wasn't here. I beg your pardon, sir, he wasn't here.

Q. Well, I am asking him, not you. You weren't here when Mr. Jahr was testifying, were you?

A. No.

Q. All right, now we have got everybody satisfied.

Mr. Pillon: Thank you.

Q. Well, anyway, you know that Mr. Jahr trapped there?

A. Yes.

Q. You saw Mr. Bugs Taylor trapping there?

A. No, I didn't.

Q. Didn't you see him there?

A. I have seen him but not, I wouldn't say he was trapping.

Q. Well, where did you see him?

[fol. 365] A. Right at the point of the diversion ponds.

Q. Was he on the the railroad right-of-way?

A. That I couldn't say.

Q. Well then, this occasion when you remember seeing Mr. Bugs Taylor there, you don't even remember now whether he was on Michigan Sugar Company property, do you?

A. Well—

Q. And what he was doing, you don't know?

A. That's right, I don't.

Q. In 1958, did you ever see a single trapper on pond number 3, to your recollection right now and you are testifying in court?

A. I did.

Q. In the winter of 1958?

A. I did.

Q. Now, where was that trapper?

A. On the northern boundary of number 3 pond.

Q. On the northern boundary of number 3 pond, that would be up in the area where the drain runs through the property?

A. That's right.

Q. Do you know who that was?

A. It was Mr. Jahr.

Q. That's the trapper you saw?

A. That's right.

Q. Did you ever see any other trapper out there in the winter of 1958, I am talking about this pond that we are talking about here, pond number 3?

A. I couldn't say that I have.

Q. Well, you can't say that you did, can you?

A. No.

Q. Did you ever see any children trapping on this pond in 1958?

[fol. 366] A. I did not.

Q. Did you ever see any children trapping on that pond in 1957?

A. I did not.

Q. Did you ever see any children trapping on that pond in 1956?

A. I did not.

Q. Now, you have testified you had seen some people launching boats, where was it that you saw them launching boats?

A. In the channel.

Q. And what channel are you referring to?

A. That would be, on the map there, it would be right off the intake house.

Q. Well, come on over here and point it out so the jury will know just what you are talking about.

A. It would be right up in this area (indicating on the blackboard).

Q. Then there is a channel that runs out to the open water of the bay, is that right?

A. Yes.

Q. Do you know who that channel belongs to?

A. No, I don't.

Q. And was that in the summer time that they were launching these boats?

A. Yes.

Q. You never saw them launching any boats out there in the winter time, did you?

A. No.

Q. You never saw anybody launch a boat out there when the sugar factory was running, either, did you, in the winter time?

A. No.

[fol. 367] Q. What I am getting at is this, when you saw the people out around the channel, which we can locate on the map, Exhibit 21, as being to the southwest on the map, and right at the end of the access road to the west, there wasn't any water in these ponds at all, was there? Just say yes or no, so we can hear you.

A. No.

Q. I want you to search your memory and I ask you again, do you have any recollection now of ever having seen any trapper on the Michigan Sugar Company premises in the winter of 1958, except Mr. Jahr, and maybe Bugs Taylor?

A. No, I can't say that I have.

(No trespassing sign marked Defendant's Exhibit No. 22.)

Q. I show you this cardboard that is marked Exhibit 22, Defendant's Exhibit 22, is that the kind of a sign that you nailed up around on the Michigan Sugar Company premises?

A. It is.

Q. Is that the kind that you nailed up in 1958?

A. Yes.

Q. How many of them did you put up around in that property, would you say?

Mr. Pillon: Are you going to show it to the jury or offer it in evidence?

Q. I am asking how many he put up there. If he only put up one, maybe I won't show it. How many did you put up?

A. We put up a couple of dozen.

Mr. Pillon: I beg your pardon. What was the answer again?

Q. A couple dozen. Where were they posted?

[fol. 368] A. Usually on our boundaries, the property line. We got them all over.

Q. Did you keep them up or did you just put them up and then let them go and never pay any attention?

A. Tried to keep them up there, keep replacing them.

Q. Did you carry them around in your car so you would have them to replace?

A. No, some in the truck.

Q. I mean in the truck. You drove a truck around there on your patrol, is that it?

A. Yes.

Mr. Smith: Now I offer in evidence the Defendant's Exhibit No. 22.

Mr. Pillon: I would object, your Honor, but I don't have an objection to this.

The Court: Well, all right. It will be received in evidence, there being no objection.

Mr. Smith: No further questions.

Mr. Pillon: I have some questions.

Re-cross examination.

By Mr. Pillon:

Q. We have only covered the pheasant hunting season which is 15 days I believe in October toward the middle or end of October, is that right?

A. Yes, sir.

Q. That's what Mr. Smith told us. Is there any other kind of fowl that they hunt?

A. Duck season.

Q. Duck season. Does duck season begin after the pheasant season?

A. It does.

Q. And doesn't it last for 60 days or about 60 days, so you saw duck hunters out there, didn't you?

[fol. 369] A. Yes.

Q. Sure. So from the beginning of the pheasant season to the end of the trapping season it is one continuous time for hunting or trapping, either hunting or trapping, is that right?

A. That's right.

Q. And you say that you go around the ponds once or twice a day. Do you have any particular time to go around?

A. First thing in the morning, yes, about 7, 7 to 8 o'clock in the morning.

Q. You go around once at 7 o'clock in the morning, is that it? And then when do you go around in the summer time?

A. About 4 in the afternoon, if necessary.

Q. If necessary. You don't always go around there, you don't know who is out on that land then, hunting or trapping, from some time, how long does it take to make the rounds, first of all?

A. Pardon?

Q. How long does it take you to make a round trip?

A. Well, that depends upon the conditions, maybe three hours, at the most.

Q. At the most you would say 3 hours. What is the least time it would take?

A. Well, just running around there, checking vital points, it would possibly take about an hour, an hour and a half.

Q. So from an hour or an hour and a half to three hours, in other words, from maybe 7 to 8:30 or 7 to 10, something of that type, you are going around those ponds. And you don't know who is on those ponds when you are not around, isn't that right?

A. That's right.

[fol. 370] Q. Now, do the duck hunters use boats?

A. They do.

Q. Don't they in fact launch their boats in the duck hunting season down in that canal?

A. They do.

Q. And in fact, in the winter time you see cars that actually drive out to the Bay to ice fish, don't you?

A. They do.

Q. Now, this post sets back how far from the railroad track?

A. I would guess about 100 feet.

Q. 100 feet, and how far does it cross the railroad right-of-way, in other words, from one edge of the pond number three to the edge of pond number 2, if you drew a line between pond number 2 and this pond number 1, an imaginary line, how far would it be across from there to pond number 3?

A. I would guess that it would be in the neighborhood of 100 feet across there.

Q. So that this no trespassing sign, which way would you put it on a telephone pole?

A. It would face to the west.

Q. To the west. That is out toward the Bay, is that it?

A. That's right.

Q. Would it face to the southwest or—

A. We have two there, we have two signs up there.

Q. You put two signs up. What directions do you—

A. There is one facing south and one facing to the west.

Q. One is facing to the west, and now one is facing toward pond 3, is that it?

A. That's right.

Q. And the other one is facing to the south toward the fresh water pond here?

[fol. 371] A. Yes.

Q. You have then none that actually faces people that would be walking up the C & O Railroad track as far as being in a southwesterly direction on that post?

A. On the east side of the track there is, yes.

Q. Up here on this post right here I am talking about when you say you post two signs?

A. Yes.

Q. Now, you said one is to the west?

A. That's right.

Q. The other one is to the south. Now, the railroad track

is facing southwest. Do you have a third sign that faces southwest, tacked on that post or do you just the—

A. No, I think that's all there is, just those two.

Q. Those two. You were asked in 1958 can you remember ever seeing another trapper up there, you said that I can't say that I have, isn't that right?

A. That's right, I can't say.

Q. That doesn't mean that there couldn't have been other trappers up there, but you have no recollection of seeing them?

A. That's right.

Mr. Pillon: I have no further questions.

Re-cross examination.

By Mr. Smith:

Q. The duck hunters that you talked about, go out toward the Bay shore, don't they?

A. That's right.

Q. They don't go back in your pond?

A. No.

Q. How wide is that shore along there between the Sugar Company ponds and the water itself, as it was in 1958?

[fol. 372] A. That would be from the water line

Q. Yes.

A. Well, I'd say there would be three, four hundred feet.

Q. That's marsh?

A. Marsh area.

Q. That's kind of no man's land?

A. It is.

Mr. Smith: I think that's all.

Re-cross examination.

By Mr. Pillon:

Q. As a matter of fact, though, you have seen duck hunters along the railroad track, haven't you?

A. I haven't seen duck hunters along the railroad track.

Q. Have you seen them up along the ditch there between pond number 3 and pond number, let me see, pond number 5?

A. Walking down to that area, yes.

Q. In other words, you have seen duck hunters actually walking down through this area, during duck hunting season, through the area between pond 3 and 5?

A. Yes.

Mr. Smith: That's all, sir.

Mr. Pillon: Now the plaintiff will rest his case.

* * * * * * *

Thursday, February 16, 1961
1:35 p. m.

MOTION FOR DIRECTED VERDICT AND RULING THEREON

Mr. Smith: If the Court please, the plaintiff having closed their proofs, the defendant now wishes to move the Court for a directed verdict of no cause of action, for the reason that the plaintiffs have failed to produce evidence [fol. 373] either that would tend to establish any responsibility on the defendant for the death of the children; second, that the plaintiffs here, apparently the parents and the grandparents, if it is determined that they have a right of action in the cause, were guilty of contributory negligence as a matter of law in permitting these children of tender years to go into an area which either was known to them to contain the hazards which here existed or in the alternative, permitting them to go into an area which was unknown to them, as to what kind of a place it was. It was, however, known to them that it was a place where the Michigan Sugar Company maintained the ponds and dikes as has been testified to here in court.

This motion is made without waiver of our right to go to the jury on the questions here at issue, in the event a motion is made by the plaintiff.

I don't know as I need to elaborate on the issues, your Honor.

I think that the cases upon which this lawsuit is predicated are inapplicable to the facts of the instant case.

(Argument of Counsel on Motion.)

* * * * * * *

The Court: * * * Under the circumstances, the Court will follow the usual practice prevailing under these circumstances, and will take defendant's motions for a directed verdict under advisement and reserve its decision in accordance with the provisions of the Empson Act, without prejudice to the defendant's rights to renew the motions at a later time in the event it appears propitious to do so.

I think that with that statement, the Court reserving decision as the Court believes it has a right to do, in both cases, will now proceed with the trial of both cases.

(Jury brought in.)

[fol. 374] The Court: Do defense counsel desire to make an opening statement at this time?

* * * * * * *

(Defendant then made its opening statement.)

* * * * * * *

Trojan, Eugene F., was thereupon called as a witness on behalf of the defendant, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. You are Mr. Eugene F. Trojan?
A. That's right.
Q. And what is your age, sir?
A. 46.
Q. Where do you live?

A. In Saginaw.

Q. Were you formerly a resident of Sebewaing?

A. I was.

Q. And how long ago were you a resident of Sebewaing?

A. From 1937 to 1944.

Q. Was it after that that you moved to Saginaw?

A. Well, by way of Pinconning, I first went to Croswell, then Lansing and Saginaw.

Q. I take it that your activity was governed pretty much by the responsibilities of your job?

A. That's right.

Q. What is your position with the Michigan Sugar Company?

A. I'm the general factory manager of the Michgian Sugar Company.

Q. And will you tell us what your duties encompass in that job as factory manager?

[fol. 375]. A. It is my duty to see that the plants and all the equipment run, also to see that the operation is going along all right, and that the sugar is produced to a high standard of quality, also that all of our wastes are taken care of, and also, it is my job to see that the employees that we have for our plants are treated according to the contract that we have with them.

Q. Now, I take it that the Michigan Sugar Company has more than one plant?

A. That's right.

Q. How many plants are they operating now?

A. We operate four plants as operating plants where we make sugar from sugar beets, and then we have another plant where we just receive our beets.

Q. Now, is it your job to supervise all four of the plants that are—

A. That is right.

Q. Did you at one time work at the plant at Sebewaing?

A. Yes, sir.

Q. When was it that you worked there?

A. 1937 to 1944.

Q. During that time you say you lived in Sebewaing?

A. That's right.

Q. What were you doing at the plant during that time?

A. I was an assistant superintendent at the time.

Q. And as assistant superintendent, what were your duties?

A. Well, to do with the operation of the plant.

Q. You ran the plant?

A. That's right.

Q. Now, that includes some supervision of the ponds that have been talked about in this lawsuit?

[fol. 376] A. No, sir, not in that position.

Q. Did you know that the ponds were there?

A. I knew the ponds were there, yes.

Q. And how many of them were constructed up to 1944, when you were out there?

A. We would have lime pond Number 1, 1944, at the time I was there, and we would have pond—

Q. You said lime pond Number 1?

A. That's right, and then we had pond, part of pond Number 2.

Q. That is the pond that is—

A. No, that would be lime pond, pond number—

Q. You mean pond Number 2?

A. That's the one right above it.

Q. Pond number 2 lies just to the north of lime pond number 1?

A. That's right.

Q. And so we have the thing all in sequence, lime pond number 1 lies just to the north of the plant itself?

A. Right.

Q. Where is the plant located with reference to the property?

A. Well, it would be on the south side of the ponds, the plant, well, south of lime pond number 1 and 2 there.

Q. Shall we say without being guilty of asking leading questions, that it was the southeast corner of the Michigan Sugar Company premises?

A. That's right.

Q. Were those the only two ponds that were constructed?

A. That is right, sir, at that time.

Q. When were the other ponds put in?

A. Well, I left Sebewaing in 1944 and going to Croswell where I had the same position, pond number 3 and 4 were constructed after I left there.

[fol. 377] Q. Pond number 3 is the pond which lies substantially in the middle of the property?

A. Right.

Q. On the map here. Pond number 4 lies to the west of it?

A. Right.

Q. Now, when did you become plant manager so that you had charge of this plant again?

A. In 1956.

Q. And in 1956, was it part of your duty to be familiar with the pond areas?

A. That's right.

Q. And the operation of the plant?

A. That's right.

Q. In Sebewaing?

A. Yes, sir.

Q. How many of the ponds were in, installed, in 1956?

A. We had pond 3, pond 4, pond 5, and pond 6 went in, I am not too sure, either '56 or '57, some time about that time.

Q. Well then, will you tell us whether or not all of the ponds which are displayed on the map here, were installed by 1958, December 21?

A. Yes, sir, I would say yes.

Q. Very well. Now, without giving us a course in engineering, tell us why we have these ponds, why are they there?

A. Well, in our operation we use quite a bit of water. These beets come in from the farms dirty, soil is attached to them, and we have to wash them, so we have what we call soluble solids, this soil that is attached to the beets

separates itself into the water that we use to bring these beets into the plant and we also wash the beets.

[fol. 378] Q. Now, at this point let me interrupt you to ask, where are the beets washed, are they washed in the plant or outside?

A. We have what we call two places. We float the beets into the plant from the outside, we have big piles of beets, but under these piles we will have open trenches so we run water into these open trenches and the beets are conveyed by the water into the plant. Right in this open trench they are washed. Then we try to take out all the large and small weeds and beets tops that come along with the beets, so these we first take out with mechanical equipment, and then the beets after this large trash is taken out, go into the equipment that we call the beet washer, and it is set up so the beets are put in and then the water is put in and it is agitated and we wash the beets.

Q. What becomes of the wash water that you use for washing the beets, as you have described them to us?

A. This wash water, we have screens that we pass this wash water through, to take out any larger particles that are in the water. Then this water with the sand and clay and different kinds of soils is run out to mud pond, that's pond, that would be at the south—right there, that's right.

Q. This is the area which is in the mud pond?

A. That's right, that's where it runs out.

Q. How does it get out there?

A. It is pumped there, all this water is collected in a pit inside of the plant and then we have pumps that will take this water and elevate it above ground to the ponds, to the mud pond that is marked at the bottom of the sheet there on the left hand side of the sheet.

Q. Now, what happens in the mud pond?

A. In the mud pond we separate much of this sand and the different soil, it will settle out, and we will take and [fol. 379] re-use some of this water, we will pump that back to the place where we bring these beets in.

Q. Back in the plant?

A. No, right where we bring in the beets from the outside, we will call that a flume, these trenches are called flumes, and we will re-use that water. Now, the sand that settles out, we do empty these ponds now and then and take this sand and mud out of these ponds, but if I may go on and say, that in the beet washer we add fresh water, we keep adding fresh water to make up for some of the water that is lost in the operation, there's always some lost, an we add fresh water and that goes out to the pond, to that mud pond with the other water that we keep recirculating and after the mud pond, this water after a while, the sand doesn't settle out as readily, so we try to take out some of the heavier water that has the sand in it, and we will bring it out into pond number 1, that is pumped over into pond number 1, that's right above.

Q. That is the pond which is shown here just to the rear of the mud pond?

A. That's right.

Q. And alongside of the C & O Railroad?

A. That's right. Then we get some more settling in that pond, and it will go from there over to pond Number 2.

Q. Pond number 2?

A. Right above.

Q. Is the next pond to the northeast?

A. That's right.

Q. As shown on the map.

A. That's right.

Q. All right. Will you continue to tell us some more about the origin of the water that comes into the several ponds. What happens, let's follow through to pond number 2.

[fol. 380] A. All right.

Q. And tell us what happens to the water after it leaves pond number 2?

A. Well, after it reaches pond number 2 it is able, goes off into that corner there, where we have this State wier, and when we have no ice cover on the Bay, we are allowed to send this water out into the Bay, after removing all of

this soluble solids material, the soil that is attached to the beets.

Q. How is it carried out to the Bay when you are permitted to remove it?

A. We have a ditch there, drain.

Q. And is that the ditch that is marked drain on the map?

A. Yes.

Q. And then proceeds east and west across the map and out in a northwesterly direction?

A. That is right.

Q. Along the point marked drain?

A. That is right, yes, sir.

Q. Very well. Now then, you say that it is carried out through that drain if there is no ice in the waters of the Bay?

A. That's right, sir.

Q. What happens to it if there is ice in the Bay—

A. Well, if there is ice in the Bay, we will quit putting it into pond number 2, we will shut off the State wier, this wier is sort of a dam, that we are able to raise or lower, and we will block that off and we will take the water, what is in pond number 2, but instead of going from pond number 1 to pond number 2, we have a pump that will take the water from the end of pond number 1, and pump it into pond number 3.

Q. Now, we are talking about pond number 1, is that the same thing as lime pond number 1?

[fol. 381] A. No, that's mud pond number 1.

Q. Pond number 1 is down where you have indicated before?

A. Yes.

Q. So you do go from pond number 1 to pond number—

A. 3.

Q. 3 as well as 2?

A. That's right.

Q. Then what else, what else happens to the water?

A. Well, we have to continue, if the ice is still on the Bay, we will go on to pond number 4, pond number 5 and pond number 6, we will fill those. By that time our campaign is over and we will retain that water in those ponds until the ice is off the Bay in the spring.

Q. Now, we have on the map another area marked lime ponds number 1 and number 2.

A. Right.

Q. What is the function of those two ponds?

A. Well, in the manufacture of sugar after this sugar is in the beet—

Q. I beg your pardon, I didn't hear.

A. In the manufacture of sugar, the beets are first, after they are all washed, they are cut up into fine shreds, and we use water to remove the sugar out of the beet, and after we get all the sugar out, we purify it and we use limestone to purify the sugar juice. Now the limestone will attach itself to fine particules of mud, fine particles of beets, and we will remove that from the juice by what we call filtration, it is a purification process, and this fine lime, calcium carbonate, fine-ground-up limestone, is filtered out. Filtration, we call it, we pass it through a series of filters, of cloth, similar to straining of, oh, grape juice. It is a cloth filter, and we will, this lime or the juice will go through [fol. 382] the cloth and this limestone, powdered limestone, will stay on the cloth. We will dump that into a conveyor, and then add water to it and pump it out to the ponds. So it is ground-up limestone that is in these ponds. Now, we also will take, after we get the sugar out of the beet, out of these fine chips, the residue we call pulp, and in order to get this pulp over to our drying operation, this pulp contains about 95 per cent water, and we will dry it in our drying operation, so we have dry pulp, with very little water in it, but this water that conveys this pulp to the drying operation we call the process water, we mix this with this fine lime that goes out to the ponds, so it's a water and fine limestone that goes to the ponds.

Q. So that the folks will have some knowledge of what kind of things we are talking about, what is another use for this calcium carbonate?

A. Well, at some of our plants, and at Sebewaing in some years the farmers will come in, after this water leaves this fine linestone, mud, let's call it, they will take it and put in on their farms to sweeten their soil.

Q. Anything poisonous about it?

A. Not a bit. As a matter of fact, you can even buy this same thing right at some of the garden shops in town.

(Lump of calcium carbonate is marked Defendant's Exhibit No. 23.)

Q. Did I understand you to say, sir, that the sugar juice from which the sugar is obtained is passed through this?

A. That's right. I would say that that is the way it looks, it forms a cake and the juice will go right through.

[fol. 383] Q. All right. Now, what happens after the water goes through these filterings, etc., that you have told us about, where does it go?

A. Well, that water is well, juice, that water is, our juice, that has our sugar in it. Now, the concentration is very low in sugar but we will take and concentrate this juice until we get our sugar out of it.

Q. How do you do that?

A. Well, it is a matter of boiling it, same as just if I can compare it, it is like making candy where you add your sugar and milk and butter and all and you get a very thing solution and you keep boiling it and in time it will concentrate and that's about the simplest way I can explain it, by concentration the sugar separates out and from the water.

Q. Is this lime then that is in suspension in the water that goes into lime pond number 1?

A. That's right, sir.

Q. Where does it go from lime pond number 1 and 2, for that matter?

A. Well, there's a lot of water that goes out as I mentioned, this water that we use to convey the pulp from the

place where we take the sugar out of the beets to the drier, there is quite a bit of water, so first we put this mixture in lime pond number 1 and after operating I won't say exactly how many days, the limestone will settle up and the water over the top is run through that line, that's a pipe line there right above mud pound number 1. There is a pipe line there, it goes into pond number 3, it is just the overflow from lime pond number 1.

Q. Now, what is the height of this dike around lime pond number 1 as compared with the dike around lime pond number 3?

[fol. 384] A. All I can say is that it is higher, I couldn't say exactly how many feet but it is higher than lime pond number 3.

Q. Will you tell us whether or not the flow from pond number 1 to pond number 3, in order to take the flow from lime pond number 1 to pond number 3 is a gravity flow?

A. It's a gravity flow, yes, sir, running down hill, I would say.

Q. Now, what is the purpose of holding the water until the spring rather than just running it out into the Bay under the ice?

A. Water under the ice, what would happen there, if I may say, since it was brought out, the fish has to have a certain amount of oxygen to survive. Now, bringing this water right under the ice, there may be, oh, some of this soil and all may be with the water, so in order to, and there may be some fine organic particles, and they require oxygen to, let's say, decompose, these fine particles, so by putting them into this water they could deplete the oxygen right under the ice, and the fish has to have oxygen to live so we store this water and when we are running it out in the summer we have plenty of water in the Bay, so we get dilution of the water and we have winds and all, so by storing it in the ponds this organic material will settle out and we will have water that will have some organic material in it but not the amount that it has when we put it in the ponds.

Q. Will you state then whether or not this is a fish conservation measure?

A. This is a fish conservation problem and we have to do this according to orders from the Water Resources Commission, the State commission.

Q. Is that how the ponds happen to be constructed?

A. That is why the ponds have been constructed, because we are under orders from the Water Resources Commission not to let out any water when we get an ice freeze [fol. 385] and we have this plan to hold this water until the ice freezes.

Q. And have these ponds been checked so far as you know?

A. Checked?

Q. Yes, checked.

A. By the Water Resources Commission?

Q. That's right.

A. Yes, sir, they come around and check them, every so often, to see that they are in good working order, that the water is being retained in the ponds, that it is not getting into the Bay during the freezing weather.

Q. Now, Mr. Trojan, you have been in sugar business for a good many years, that is in the beet sugar manufacturing business, you said you were in charge of four plants at the present time?

A. That's right, sir.

Q. I ask you, out of your experience and knowledge as a man familiar with the subject, whether or not the method which is here employed is an accepted measure for the treatment of water washed from beet sugar plants in the beet sugar industry?

. . . . . .

A. Yes, sir.

Q. Now, do you have something to add to that by way of information in connection with you opinion? If so, will you state it?

A. I was going to add that it is not our, only our, only our company but all the beet sugar companies, whether in

this State or in other states, and there are many states where sugar beets are grown, to have this method of settling solids and retaining of water.

Q. Have you seen them?

A. Yes, sir. • • •

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[fol. 386] Q. Now Mr. Trojan, as plant superintendent, and responsible, apparently the responsible head of this as well as the three other plants, have you ever been advised that children were coming on the property represented by these ponds and trapped muskrats?

• • • • • • •

A. No, sir, I have never been informed that children were out there.

Q. Who is your local plant superintendent?

A. Mr. Buckley is.

Mr. Smith: We have no further questions. You may cross examine.

• • • • • • •

Cross examination.

By Mr. Pillon:

Q. Who informed you if anybody that two children and a dog had drowned?

A. Mr. Buckley called me.

Q. And when was that?

A. It was, I would say the same day that it happened, what day it happened I don't know.

Q. Was it a week day or a Sunday?

A. I don't recall.

Q. Do you hunt?

A. Not now, no, sir.

Q. When you lived over at Sebewaing, did you hunt?

A. Yes, sir.

Q. Pheasant?

A. Pheasant.

Q. Duck?

A. No, sir.

Q. Just pheasant?

[fol. 387] A. Just pheasant.

Q. Did you ever hunt out in this area of the pond?

A. No, sir, never.

Q. Were you ever told by anyone that hunters used this property where the ponds are located?

A. Could I—

Q. Were you ever told by anyone that hunters in 1957 and 1958 hunted on this land where the ponds were?

A. I would have to say no, sir.

Q. Were you ever informed that trappers trapped upon the land where the ponds are located?

A. I was never told that at Sebewaing.

Q. You were never told that. Now, you know what muskrats and mink are?

A. I know what muskrats are. I have never seen mink.

Q. You have never seen mink. Did you ever see them in furs?

A. I have seen them on my wife, I'd say, but—in the pelt form, you might say. I've eaten muskrat though.

* * * * * * *

Q. Well, was it ever reported to you any time that muskrats or mink caused any damage to the ponds?

A. Oh, yes, sir, it has been reported to me.

Q. Did you issue any instructions as to what to do about it?

A. The instructions are, that after the water is left—

Q. Did you issue—

A. Yes, sir, how to, we have to plug all holes made by the muskrats, those are the instructions, we have to try to find and plug the holes.

Q. Now, how many gallons of water would you say did pond number 3 hold or was in pond number 3 on December 21, 1958?

[fol. 388] A. Well, sir, I couldn't answer that, I really couldn't.

Q. How many, when does your season start?

A. The season started, starts around October 1, or within a week either way.

Q. And when does it generally end?

A. We have had runs as late as March 15 and we had had runs only up to November to Thanksgiving.

Q. Do you remember when the run ended in 1958?

A. To the best of my knowledge I would say let's see, last year was a long run, probably to the first of February, two weeks either way, that's all I can say, at the present time.

Q. Do you have any records kept under your care and supervision?

A. Yes, sir. We have records but I have the records of it but I don't keep them in my mind.

Q. I understand. Do you have any records that show how many gallons of water for instance you use during that season?

A. We have records on how much water we use per day, we have so much water pumped out of the Bay and much water returned to the Bay. That's clear water that we return to the Bay and with so much water that we recirculate and approximately how much water goes into the pond when we start storing them.

Q. Do you have any idea of how much water pond number three would hold in 1958?

A. How much it would hold?

Q. Yes.

A. I couldn't say, sir, we have never had the ponds surveyed, if I gave you a figure I would be off by a couple of million gallons.

Q. Did you ever have any engineering surveyor survey the ponds?

[fol. 389] A. Not on what these ponds will hold. The way we judged our ponds was by experience. We build ponds and we can tell by the end of the run how well the ponds are, if the following year we will say more beets to process,

a longer run, we have to decide whether our ponds are enough, and if we feel they aren't we build another pond, that is the way we build our ponds, we would just keep building them as we needed them.

Q. All the lands upon which the ponds are situated are owned by the Michigan Sugar Company.

A. Yes, sir.

Q. What background or training did you have, I don't believe that was brought out?

A. I have a degree from the University of Michigan in chemical engineering.

Q. Chemical engineering?

A. Yes, sir.

* * * * * * *

Q. Whereabouts is the pipe line close to the pond going to pond 3?

A. It would be right in line with that pipe line shown there, but it is a pump.

Q. Does it connect up to this pipe line?

A. No. No, that's separate, separate from that pipe line. We have another pipe line that goes into pond number 3 and the water from pond number 1, as I brought out, pond number 1, mud pond number 1, in order to get the water over to pond number 3, from that pond, pond number 1 is lower than number 3 so we have to pump, we go to the pipe line under the railroad track and then up onto pond number 3.

Q. Where is the outlet for that pipe from pond number 3, from down, I might put it this way, in relation to the top of this bank, how far down to the outlet is that—

A. Of that pipe line?

[fol. 390] Q. The pipe line that runs from pond 1 to pond 3 that you pump?

A. Oh, it is a guess now, again, because as I say, I never measured it and I would have to say I don't know, unless you want a guess.

Q. Does it come out anywhere near the other pipe line?

A. It is near the other pipe line but these dikes have been added onto and I really couldn't say how far from the top of the dike where the pipe is.

Q. Now, why do you call this by this name you have got on here, lime pond?

A. Well, we have different names around the beet business. We call it the lime, we call it, we don't call the beets, beets, after we once get them into the plant, we call them cozettes, we don't call the juice, we call it masaqeete (?), we have different names in the business.

Q. This what you were talking about here—

A. Calcium carbonate?

Q. Calcium carbonate. A certain amount of this calcium carbonate goes through this pipe line in pond number 3, isn't that true?

A. This calcium carbonate being heavier than water, moves that along and this water then goes through the pipe line, the calcium cabonate stays in pond number 1.

Q. The pipe line, does this go up in the air over the railroad?

A. No.

Q. It goes underneath the railroad?

A. Yes, sir.

Q. How high up is lime pond number 1 in relation to the bed of the railroad track?

A. I will say this, it is above where the lime will be when it settles out. You are able to come here this way and go [fol. 391] down, and then up and over, if you are draining here at a higher level, you can come down and go to a level lower than your highest level down here, you can do that, and that is the way that works.

Q. If I understand what you are telling me is that the outlet up here is higher than the intake over here?

A. It is lower.

Q. Lower than the intake over there?

A. That's right, that's right.

Q. Well, what goes into this here, just pure water?

* * * * * * *

A. Well, it is water that has a, some solids in it, as I mentioned, water that might have a little of the calcium carbonate and it has some sand in it, soil, different things, that it, it isn't crystal clear water.

Q. Now, when the Bay starts freezing, the ponds start freezing, too, don't they?

A. Not immediately, not immediately.

Q. Subsequent?

A. Yes, sir, they will freeze.

Q. They will freeze. Now, what is the freezing temperature of water?

A. 32 degrees Fahrenheit.

Q. 32 degrees. Well, you know what the freezing point is of the water with the ingredients in it?

A. I'd say this, that if you add any solid to water, and the solid dissolves in water, you raise the freezing point of the water. Now—

Q. What does that mean?

A. Here for example, if you take water, that will freeze at 32 degrees Fahrenheit. Well, you have ice on your sidewalk, you throw salt on it, and the ice melts, because you have raised the freezing point, from 32 degrees Fahrenheit to probably 34 or maybe 36 degrees Fahrenheit. Now, [fol. 392] not that way, from 32 down, to where it will freeze say at 28 degrees Fahrenheit, you will have to go down instead of up.

Q. You would have to go down?

A. Right.

Q. So while the water, what I am trying to get at, is what temperature does water freeze on your ponds?

A. Let's say that in some locations of our pond that the water may freeze at the same time as the Bay water freezes, but where we are coming in we have an action there, we have a circulation just like a moving River or at Niagara Falls never freezes if I may say, where you have movement.

Q. Oh, rivers freeze, though, don't they?

A. Well, not if they have movement. The Saginaw River doesn't freeze solid. Niagara Falls won't freeze because there is a movement of water, and we are getting a movement of water here by pumping and by, as this water comes in, you are continuously stirring it up so—

Q. Now, the water in the Saginaw River will freeze on the surface of it, is that it?

A. It will freeze possibly the shore line, you will notice it will freeze, if the weather gets cold enough.

Q. Out on the Bay the water freezes, there is a lot of water out on the Bay and it freezes enough so you can drive cars on it.

A. It will freeze before the Saginaw River will freeze, if I may say so, because the Saginaw River has a lot of warm water going into it and into these ponds the water at times that goes into it at time is warm, so you don't get the freezing that you do out in the Bay.

Q. Well, now, the area in front of it where the water comes into the ponds, would be less apt to freeze before ice forms on the water further away from that?

[fol. 393] A. It depends again on temperature. Say if the temperature is low enough, if the temperature is 32 degrees, then some of the water that is quiet will freeze, but the other water where you have a movement because you are pumping water in, if I may say, water at the bottom is warmer than the water at the top and by—

Q. The water at the bottom is warmer than the water—

A. That's right. That's the reason your River doesn't freeze solid. If it was just as cold at the bottom as it is at the top you would have a solid cake of ice all the way through, so in this water as we are pumping it, some of it is going down and bringing up the warmer water with it from the bottom of the pond, so if you don't have the freezing there the same as some place where the water is not in movement.

Q. So would I be safe in saying that in a temperature of, or would I—let me ask you. Assuming that the temperature was 15 degrees or 12 degrees—

A. All right.

Q. Would your water immediately in front of this overflow pipe freeze?

A. Immediately in front of the overflow pipe? Possibly, I would just make a guess that possibly—

The Court: If you don't know—

A. So I wouldn't say exactly how far, it wouldn't freeze right at the pipe, I'll say that, but how far away from the pipe where this action is taking place, I couldn't say.

Q. Now, if the water level is 3 feet down from the overflow pipe and the water is coming out of the pipe, there would be a drop there of maybe 3 feet, is that right?

A. Yes, that's right.

[fol. 394] Q. It wouldn't freeze right then at that dropping spot?

A. No.

Q. If the water level was up close to the level of the overflow pipe, it would be less movement of the water, wouldn't it?

A. You could have more movement of the water because this water is coming in there under pressure and if you were putting it right say up at the pipe where the water is coming in on the same level, this water is coming in, and your water into the pond is the same level, you have pressure on that water and it may push out further so you wouldn't have any freezing.

Q. Do you have any idea in 1958 on December the 21st how much water you were pumping through that outlet there?

A. No, sir, not here. We have some records but I don't have them here. We keep a record of everything on the water that goes out there.

Q. What is the chemical composition of this foamy, snowy like substance on top of your waste product, do you know?

A. Chemical composition?

Q. Is that what you call it?

A. No, you mentioned it. I am just stating your question, chemical composition, you said, you want to know what the chemical composition is, I just repeated what you said.

Q. Oh. Do you know what it is, what is in that foamy substances?

A. I would say there is no chemical name for it. In my opinion there is no chemical name. Water will foam on its own.

Q. Now, the bottom of these ponds—

[fol. 395] A. Yes, sir.

Q. In pond number 3, would that be a solid bottom or a mucky bottom?

A. That's a hard one to answer.

Q. You said there was sediment in the water—

A. That's right, but—

Q. It settles out?

A. But you can put sand in a place and use sand for a fill and it gets solid. Now, I couldn't say whether it was mucky, I just couldn't.

Q. Well, the dirt that comes off the sugar beets which you put into the water—

A. Yes, sir.

Q. What's the jacket of the sugar beet, you call the pulp?

A. Well, that's the whole beet, without the sugar, we call that pulp.

Q. You dump the pulp in here, don't you?

A. No, we don't dump the pulp. It is just the water that we use for conveying the pulp to the driers. We pump a mixture of ground up beets and water to our drying plant.

Q. Well, is there any part of the sugar beet that you discard?

A. No, there isn't.

Q. There isn't?

A. There isn't. We don't discard at least not intentionally. We have a process that we try to reclaim everything that goes into the plant.

Q. Now, you couldn't tell me then what the bottom of this pond would be?

A. Solid or mucky?

Q. Solid or mucky?

A. No, sir, I couldn't truthfully.

[fol. 396] Q. What about then why do you call that a mud pond?

A. Well, that mud pond there, that's where we first put our water after we've washed these beets and there I would say that it was a muddy condition because it is a wet slur.

Q. All the water that you use when you are going full blast at your plant, you don't pump it all into this little mud pond, do you?

A. That's right.

Q. All the water that fills up ponds 3, 4, 5, and 6, and 2, comes into this mud pond?

A. Yes, sir, it comes in there first. It is a settling basin, as I stated before, we do empty these ponds during the run and I will go on record and say we empty them every day. We have a crane and we dip in there and we take the mud out of these mud ponds.

Q. Do you have any pump in your plant directly into pond number 1?

. . . . . .

A. We do. As I stated, the water and the limestone, that is reused, is pumped out there, we do have a pump or we may run it by gravity.

Q. Now, so that we get the picture straight, you have got water going into this mud pond, going back into the plant, and at the same time you have got it going from the mud pond over into this pond number 1?

A. As I stated before, it does not go into the plant, it goes outside where we are bringing our beets in from the outside. We reuse that water to bring the beets in. We try to conserve water.

Q. I understand that. Do you have a connection between the mud pond and pond number 1?

A. It is a pumping arrangement, pump out.

[fol. 397] Q. You pump it?

A. That's right.

Q. Now, the water that comes in here from your plant that you used, you take a certain amount of it back and then put it back into the system out here that eventually goes back into your plant, is that right?

A. That's right.

Q. But then a certain amount of this water that is in here, you put into pond number 1?

A. Right.

Q. At the same time you are putting from the plant certain material going into pond number 1, aren't you?

A. Right.

Q. And both of these ponds at the same time can be putting water into pond number 3?

A. At a certain time of the year, yes, sir.

Q. At a certain time of the year this actually happens?

A. After the freezing, after we have ice on the Bay, we do that.

Q. So after you have ice on the Bay you are running water into pond number 3 from both pond number 1 and lime pond number 1?

A. Yes, sir.

Q. Now, so I understand, one thing more, the reason that you store this is because if you didn't it would kill the fish, is that correct?

A. If—well, if you have an ice cover.

Q. If you have an ice cover.

A. Well, if we ran this water out it would stay in a pool, it would kill some fish, some fish require more oxygen in the water than others, a carp will live in mud, perch requires a certain amount of—

Q. And in your drain area up here, your drainage, do you ever have thousands of perch ever come up there that have been—

[fol. 398] A. Into the channel, you mean? That is not a drain area, that is where the water comes, fresh water

comes from the Bay, that's our channel where you pointed to. We come in there with our fresh water, that's a channel.

Q. I understand. Do you ever have any, was there ever a condition exist—

A. That the fish come out that channel?

Q. Where the fish come up by the thousands and die?

A. I think you are referring to something that you might have read in the papers. That channel is all pure water.

Q. But why do the fish come up?

A. You are curious about that. If that is proper to answer at this time, I will answer it.

Q. What happens to the fish?

A. I will answer it if it is proper to answer it at this time.

The Court: If there is no objection, you may answer if you know.

A. The reason was this. Fish in the spring have to spawn, they lay eggs and the male comes and has to make love to the poor fish, but this, let's say that the way it was explained to us, that the fish made a mistake, it was the first year they came in there, it was a late spring, and when these waters would warm up, as it was explained to me, the fish spawn, the males come through and the little fishes come, and this channel, the fish mistook it for an open inlet and they came into this channel, and they couldn't get out, so many of them came in, they couldn't get out, and when they tried to get out there was so many of them that they just, it was too many, there were too many fish for this enclosed area of our channel.

Q. Wasn't the fact that you dumped any chemical out there in any way responsible for that?

[fol. 399] A. No, sir, we have a complete clearance from the Water Resources and as they explained it, it was due to this spawning, where the fish mistook it for one of their spawning areas.

Q. You do not have a sign erected, a warning sign, of danger or anything like that, near this overflow pipe, do you?

A. Sir, you are asking me something that I leave to my local man. We have a factory manager at each plant and the instructions are given to the plants by me to do certain things. If there is a sign posted there or not I couldn't say.

Mr. Smith: It is conceded or admitted that there was no warning sign posted, if you are talking about a danger sign at that area, the only signs that were posted were the no trespassing signs.

Mr. Pillon: Thank you, sir, but I feel it is necessary to spend some time because of the fact that I want to show that—

Mr. Smith: It is admitted in the pleadings, I believe.

The Court: Well, what is your next question?

Q. Now, do you have any idea what it would cost to erect a sign?

Mr. Smith: Just a second. I object to that as immaterial.

The Court: I will sustain the objection.

Mr. Pillon: Now, your Honor, one of the things, as I understand the law, and maybe you would explain to the jury on this but it was brought out when we were arguing this issue, was the fact that the cost of maintaining was slight compared to the risk, I think I have a right to show it, that's a point that was raised here, I think I have a right to show what they could do because of the cost of it.

[fol. 400] The Court: You mean put up more signs?

Mr. Pillon: Put up a sign and what it would cost to put a fence across there, it would cost, I think I am entitled to go into that.

The Court: Well, all right. If you know, you may answer.

A. Well, the cost to put up a sign?

The Court: If you know.

A. A man's time and the sign, five dollars.

Q. What about putting a fence from either side of this, maybe 10 feet on the south, southerly side, and 10 feet on the northerly side of this pipe line over to the island.

A. Over to the island?

Q. Isn't there an island extending—

A. Yes, there is.

Q. There is. How far is that distance across there?

A. That I wouldn't know.

Q. You wouldn't know?

A. No.

Q. Do you have any idea what it would cost to put—

A. I can tell you how much a foot but I can't tell you how much it would take or anything.

Q. It wouldn't be too expensive an item?

A. It would depend how high you would have to put it on, I don't want to be facetious or anything but I just want to say that I don't know what type of fence you would put in there, a ten foot fence, a twenty foot, a two foot or one foot. I can't give you a price on that. Now on a sign that was simple. A fence I couldn't say, sir.

Q. Do you have any fence at all on this property, around your property, Michigan Sugar property?

A. Yes, we have some fence, the whole place, around the Michigan Sugar Company property.

[fol. 401] Q. Where is the fence at?

A. Well, we have a fence at the entrance of the plant area.

Q. A fence at the entry to the plant area?

A. Yes.

Q. How far does it run along?

A. Not very far.

Q. Does it cover, would it be as long as the plant is?

A. No, it wouldn't be, and then we have the fence along the road, where that mud pond is, right along there.

Q. You have a fence, how long is it, in relation to the mud pond?

A. Oh, I would say it goes right along the mud pond, a very low fence that possibly is knocked down at the present time, probably the wire is just there because I wouldn't say how high it was or anything.

Q. How long has the fence been there, do you know?

A. Oh, the fence has been there, I have been there since 1937, the fence was there then, and possibly the same fence so what condition it is I wouldn't know but there is a fence there right at that point.

Q. Do you have any other fence involving this property?

A. Not that I know of, sir.

Q. Do you own the land immediately north of this pond number 6?

A. We don't own the land, no, not north of number 6. We have a little there just at the bottom of our dike but not very much.

Q. What about east?

A. East of pond number 5?.

Q. East of the last pond there, you can see where the blank space is.

[fol. 402] A. Oh, right there, no, sir, we don't own any land there, no.

Mr. Pillon: I have no further questions.

BUCHELE, MORRELL, was thereupon called as a witness on behalf of the defendant and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Where do you live, Mr. Buchele?

A. Sebewaing.

Q. What address?

A. 251 Tenth Street.

Q. How long have you lived at Sebewaing?
A. Five years this July.
Q. Married?
A. Yes, sir.
Q. Do you have a family?
A. Yes, sir.
Q. And what is your business?
A. Work for the Michigan Sugar Company, factory manager.
Q. How long have you worked for the Michigan Sugar Company?
A. Continuously, almost 25 years.
Q. How long have you been the factory manager?
A. To begin with, in 1950, to about '52, and since April, 1957 in Sebewaing.
Q. I think you said you lived at Sebewaing five years?
A. Yes, sir.
Q. During all of that time did you work for the Michigan Sugar Company?
[fol. 403] A. Yes, sir.
Q. Apparently you were made plant manager in April of '57?
A. Yes, sir.
Q. What was your title before that time?
A. I was assistant factory manager in Sebewaing.
Q. Who was the manager?
A. Pardon?
Q. Who was the manager when you were assistant?
A. Mr. E. C. Cuminger.
Q. Now, in April, 1957, when you became factory manager, what were your duties? What did you do at the plant, to justify your title?
A. Take charge of the whole establishment and repair the machinery and equipment for the workers and getting ready to run the campaign.
Q. Were these ponds and dikes under your supervision?
A. Yes, sir.

Q. When did your season start in 1958, if you recall?

A. Very close to October 1st.

Q. How long did it run?

A. Probably first week in February, that we stopped slicing beets.

Q. At the time you started in October, to process the sugar beets, were your ponds drained?

A. Completely.

Q. And you heard the testimony of Mr. Trojan as to the manner in which the beets were processed?

A. Yes.

Q. And the ponds utilized. Do you have any correction of that to make?

A. Not that I can think of.

Q. Now tell me this. In 1958 were you ever advised or, first off, were you ever advised by anybody, that children [fol. 404] were trespassing on your plant property back there in the pond area?

A. No, sir, not at all.

Q. Did that information come to you in any other manner?

A. No, sir.

Q. Do you know now whether any child ever did trespass on your property in 1958?

A. No, sir, I don't.

Q. Is there a road that runs alongside of the Sugar Beet or the Michigan Sugar Company property on the east?

A. Not right adjacent to the plant. There's one down probably two blocks or so, east of the main factory.

Q. Is that the only highway in there?

A. Yes, sir.

Q. Is there another road that runs around your fence to the back end, around lime pond number 1?

A. Yes. There's one comes from this what we call Rose Island Road, goes in between the lime pond number 1 and the main factory.

Q. Is that a public highway or is that a private way that belongs to the Michigan Sugar Company?

A. That's entirely all our own property.

Q. Is there any other entrance to the pond area except the one that is shown on the map down in the southwest corner and to which we have referred many times, just at the end of what is described on the map as an access road?

A. There is no other entrance.

Mr. Smith: You may cross examine.

[fol. 405] Cross examination.

By Mr. Pillon:

Q. First of all, would you go up to this map and draw in this road that comes from the Rose Island Road and show us where it is at?

A. This is Rose Island Road, this is the plant area but we have to follow about in here.

Q. Will you draw in enough so that we can see it?

A. It comes down in here (indicating).

Q. Just draw it on there anywhere close. Now, a person can drive their car, do you have any type of a gate at the entrance to that road off of the Rose Island Road?

A. Nowhere on that road, and it is a dead end right here, you can go in here and go back out.

Q. Now, do you have anybody in your employ there at the sugar pond at Sebewaing whose duty it is to keep people off the pond area?

A. No, sir.

Q. Do you have anybody that posts any signs?

A. Yes, sir.

Q. During the, in the year 1958, the only type of sign that you had posted on that property were these little signs (indicating)?

A. I believe so.

Q. Now, you knew that Mr. Jahr trapped on your land?

A. I overheard about that, I never gave him permission.

Q. You never gave Mr. Jahr permission?

A. No, I never seen him out there.

Q. You never saw him. Was it ever reported to you that he had as many as a hundred traps set out there?

A. No, sir.

[fol. 406] Q. Or ten traps?

A. No, sir.

Q. And you are positive that you never, did you ever have any conversation with him about giving him permission to go on the land?

A. I never had any. He has had conversation with me in asking me if he could trap out there, I told him I didn't think I had authority to allow him to go out there.

Q. Whereabouts in the plant do you work?

A. Whereabouts in the plant?

Q. Yes, do you work?

A. I have no set spot, it is all over the whole plant, that's my—

Q. I understand. Do you have an office in the plant?

A. Yes, sir.

Q. And whereabouts is it located in the plant?

A. On the second floor.

Q. On the second floor. Do you, I guess you don't trap, do you?

A. No, I never have.

Q. Did you ever hunt?

A. Not in the last ten years.

Q. Not in the last ten years. Did you ever drive up on the dikes?

A. Occasionally.

Q. If I stuck a stick in the ground and had a rag tied on it, did you ever see any of those?

A. No, sir.

Q. Up on the dikes. Were you up there in the year 1958?

A. I probably was but I couldn't say what day.

Q. I didn't get your answer, you probably were?

A. Intermittently.

Q. Maybe or maybe not. I didn't get your answer, I am sorry. Were you up there in 1958 or not?

[fol. 407] A. Yes, I'll have to say I have been on there every year, at least every month.

Q. When in 1958 did you get on there?

A. I can't recall that far back.

Q. Were you on there in November, 1958?

A. I don't know.

Q. Or December of 1958?

(No Answer.)

Q. You said that you had no knowledge that any children had trespassed up there in 1958, is that right?

A. That's right.

Q. Didn't you know these two children and a dog drowned in there?

A. Yes, sir.

Q. Is your answer then that you still don't know that there were any children that trespassed up there in 1958?

A. Not before that, no.

Q. Well, do you know a fellow named Floyd Taylor known as Bugs Taylor?

A. Never heard of him.

Q. You never heard of him. Did you ever see anybody ever set any traps on your land, on the land where these ponds are located?

A. No.

Q. Were there fences on this property or any part of it when you came there in 1956?

A. Some.

Q. I believe about '56 you came?

A. Some.

Q. And have those fences been maintained?

A. No, sir.

Q. During hunting season have you ever heard gunfire out on the ponds?

A. Yes, I have.

[fol. 408] Q. You have. Did you ever see any hunters out there?

Mr. Smith: Out where?

Q. Out on the ponds, on the pond area, around ponds 1, 2, 3, 4, 5, and 6, and the lime ponds?

A. Well, may I say at that time vegetation is so high that a man is not visible unless he is standing on a dike or a high spot of ground there.

Q. Well, you are on the second floor of the factory and can you look out of the window and see that area?

A. No, it is on the opposite side of the building.

Q. It is on the opposite side of the building. Well, when you made these, some trip up there, onto the dike roads, did you ever do it in 1958 during the hunting season?

A. I don't know.

Q. Well, have you ever seen any hunters up there?

A. No, sir.

Q. But you have heard the gunfire?

A. Yes, sir.

Q. Would that be in the year 1958, hunting season of 1958 you heard gunfire?

A. I don't know, I couldn't tell, I couldn't say.

Q. Did you ever go around to see what type of a job—well, strike that. Who is the man you had to post this property?

A. A truck driver and dike inspector, Max Meisner.

Q. Did you ever go and check the areas where they posted signs?

A. Yes.

Q. Did he ever claim to you that any signs had been shot?

A. He has mentioned it to me, yes.

Q. Can you tell us if any damages were done to any of your dikes as a result of muskrats or mink on the premises?

[fol. 409] A. Yes.

Q. In the year 1958, would you tell us specifically whether any damage was done?

A. No, I can't.

Q. Was one of Mr. Meisner's duties to instruct people to get off the premises if they were there hunting and trapping?

A. If it was possible after he had seen them to go close enough to establish any communication that they are trespassing and they should leave.

Q. You never issued any instructions to Mr. Meisner to remove traps that were set on the property for muskrats or for mink?

A. No, sir.

* * * * * * *

Q. Did Mr. Meisner ever—well now, let's go back to Mr. Jahr. How do you know that Mr. Jahr was trapping on your premises?

A. I don't know.

Q. Did he ask you for permission?

A. He has asked for permission but I never granted any.

Q. Did Mr. Meisner tell you that he was trapping on the premises?

A. I can't say.

Q. He may have or may not have but you don't remember it, is that it?

A. That's right.

Q. Did Mr. Meisner ever tell you that there were traps set by other persons up at the ponds?

A. I can't say.

Q. He may have or may not have but you don't remember, is that right?

A. That's right.

[fol. 410] Q. Did Mr. Meisner ever complain to you that hunters removed any of the signs that you posted?

A. He had told me that has happened.

Q. How tall would the vegetation be on the pond number 3 in December of 1958?

A. Around the edge, may I ask? In whereabouts?

Q. Well—

A. It will vary the reason I say that, it will vary.

Q. We will start down at the bottom of the bank and work right up to the road. Starting at the very bottom, say on the railroad side, how tall would that vegetation be?

A. I'd say that on the railroad side, it would probably be very high there. Some of the other sides it may be as high as, I would have to guess, may be 8 or 10 feet on the outside of the dike.

Q. You say it would be 8 or 10 feet right on the outside you mean around the outside of—

A. That would be on the south end and on the west.

Q. On the south and on the west. What about on the inside of the pond?

A. It's likely not to be quite so high but there is still probably 5 or 6 feet, I am just guessing on that.

Q. If a person was up on top of the roadway they would be clearly visible?

A. It goes on clear up to the side, clear up to the roadway along the edge of the roadway, too, by the way.

Q. In other words, there is vegetation, you say, right up to the roadway here, and at the edge of the roadway how high is it, would you say?

A. Some 5 or 6 feet, at least, I should say.

Q. Now, the roadway around by the railroad track side, how high is it?

A. I can't answer that, I don't know.

[fol. 411] Q. You can't. When you go up onto the pond area, do you drive or walk?

A. Always drive.

Q. Always drive. Where do you park your car there? I assume you drive to work? Where do you generally park your car out there?

A. Right in front of the plant.

Q. On the south side of the plant here?

A. Yes, sir.

Q. Did you ever see, where do the employees park at?

A. The same location on the south side of the factory, the main factory building.

Q. Is there a parking area along the road that comes off the Rose Island Road, I will start over with my question. Does this Rose Island Road just stop right here in this piece of property?

A. No.

Q. It goes on?

A. Yes, sir.

Q. Will you draw it in where it goes, please?

A. I am not sure I can do that, not on that map.

Q. Well, is there a roadway that runs down this side of the property (indicating)?

A. Not at all.

Q. Not at all. How far over before we come to a road on the north side?

A. From where?

Q. From the, oh, we'll say from the edge of your property line here to the roadway?

A. The only road over there is one that goes up to fishing place there and I would have to guess there, I never measured it, I don't know.

Q. There is a fishing place over there, is that the idea?

A. Some place over in there, surely.

[fol. 412] Q. Now, this road, you call it an access road, is this part of Miller Road in here?

A. Pardon?

Q. What you call on access road, on the map instead of being an access road, that's a, Miller Road runs down this way into Sebewaing. Now, what you call the access road, is that a continuation of Miller Road?

A. I would think so, I don't know.

Q. Does the public generally come down this road and go over here and launch their boats in the canal?

A. The public? No. There may be some.

Q. I see. Do the commercial fishermen do that?

A. I don't know. Not that I know of.

Q. Did you ever see duck hunters up in this way along this area?

A. No, I never did.

Q. Did you ever see cars go out here on the ice, ice fishermen?

A. Yes, I've seen one or two this winter already go out there.

Q. Is there any—

Mr. Smith: When you say go out there ice fishing—

Q. Go out to the Bay.

Mr. Smith: Saginaw Bay?

Q. All right.

Mr. Smith: You have been pointing to pond number 3, as far as the record goes.

Q. You have a, where this channel goes out into the Bay, up in the front part of it, you have a little pump-house of some kind?

A. It is not a pump house, it is just a cover for our—

Q. A cover for what?

A. For our intake screens.

[fol. 413] Q. Oh, intake screens. What do you, what is the object of that, what is the function?

A. The screen or you mean the house?

Q. Both.

A. Well, the screens are to keep any sizeable object from coming in in our intake pipe, to get into the factory in the first place.

Q. Do you have a fence around it?

A. Oh, yes.

Q. How high a fence is it?

A. I don't know.

Q. Well, what is the object of the fence?

A. It is an open pit right there, at ground level.

Q. I beg your pardon, I didn't hear you.

A. It is an open pit right there, at ground level, and the water level is below the ground level and that's the only reason I know.

Q. You didn't, the fence wasn't erected when you first came there, was it?

A. Oh, yes.

Q. It was already there when you came there?

A. I'm sure it was.

Q. As I gather this picture here, you are in charge of the plant and have the full authority over this area in relation to any type of fencing or safety devices that you would want to put on this area, is that right?

A. That is not quite right, in this way. I don't have the authority to do, that has to come from higher up.

Q. What authority do you have to recommend it, is that it?

A. Possibly.

Q. Possibly?

A. Yes.

[fol. 414] Q. Do you have any idea what it would cost to erect a sign at the point where the overflow pipe comes out into this pond?

A. What kind of a sign?

Q. Yes, any sign that says danger or something of that kind. What type of a sign would you be inclined to put up any type of a sign there, or recommend it?

Mr. Smith: I think, if your Honor please, that is immaterial.

* * * * * * *

By Mr. Pillon:

Q. The road that you have coming off the Rose Island Road, running in between south of lime pond number 1 and 2 and going on the west side of the fresh water pond up toward the pipeline leading from lime pond number 1 into lime pond number 3 and running northward of the plant area in a more or less westerly direction until it turns and goes in a northerly direction west of the fresh water ponds, have you ever in the year 1958 seen cars on there that didn't belong to the employees of the company?

A. 1958? I can't remember that I have.

Q. Did you ever see any trappers or hunters along this road?

A. No, sir.

* * * * * * *

(Court met pursuant to adjournment.)

(Parties present same as before.)

(The same witness resumed the stand and was examined as follows:)

[fol. 415] Cross examination (continued).

By Mr. Pillon:

Q. Sir, I would like to ask you a few more questions. Will you tell me how much higher in elevation lime pond number 1 is compared to number 3?

A. I don't know the elevation. I would say that would probably be at least, well, there's enough elevation so that the water will flow by gravity from the lime pond to the other pond, I don't know for sure—

Q. Now, do you know how far down from the top of the road level of pond number 3 the outlet is of the—

A. I have never measured it, it must be around 3 or 4 feet.

Q. Is it possible that the water can fill up over that pipe?

A. It is possible, I suppose.

Q. Were you there, did you go out to the scene on December the 21st?

A. No, sir.

Q. December 22nd?

A. No, sir.

Q. Did you ever go out to the scene after the accident happened?

A. Yes.

Q. When?

A. I don't remember the date.

Q. To put a date in your mind, it occurred on December 21, 1958, when in relation to that date did you go out?

A. It would have been right soon, it would probably have been the next day.

Q. Wasn't the water level on that day, what was the water level on that day in relation to the opening of that pipe?

[fol. 416] A. I don't remember.

Q. What is the temperature of the water that's coming out of the—

A. I have never measured the temperature of that, but it should be very close to the air temperature, I should think.

Q. Do you think it would be warmer than the water in the pond?

A. Possibly so.

Q. Possibly so. Now, did you, how many stories is the sugar plant?

A. Pardon?

Q. How many stories high is the highest point in the sugar plant?

A. The main factory building, it is—

Q. It is how high, about five stories high?

A. The highest point.

Q. About five floors high?

Q. Have you ever been out on the upper floors and looked out any of the windows?

A. Yes.

Q. When you heard gunshot during hunting season on the pond areas, did you ever look out the windows and see any hunters?

A. No, sir.

Q. Did you have any indications that there were hunters?

A. No, sir.

Q. Did you have any indications that there were hunters?

Mr. Smith: Just a second. How would he have any opinion as to what they were? They might have been shooting each other out there as far as he knew.

[fol. 417] Q. Well, if he heard gunshot during hunting season, this goes to the matter of knowledge, as to what he assumed, it was.

The Court: Well, all right, ask him.

Q. What did you assume it was?

The Court: Did you assume anything from—

Q. Did you assume anything when you heard the gunfire out on the pond during hunting season?

A. Assumed it could be hunters.

Q. Now, this matter, is there or is there not any railroad spurs that come off the C & O railroad track going into your plant?

A. There are spurs come off the railroad.

Q. How many spurs are there?

A. I am not sure.

Q. You are not sure. Well, what was north of this road here which is called Pine Road. What is the first spur you have coming off of the railroad, C & O railroad track, what is its location?

A. Well, from the main line.

Q. From the main line, going into your plant?

A. The only way I can tell is the first one comes off the main line and I believe goes right by the sugar warehouse, that would be on the south side of our main sugar warehouse.

Q. On the south side of your plant area here?

A. Yes, sir.

Q. Does it go north or south of the mud pond?

A. Has to go north.

Q. It has to go north to the mud pond, to the south of pond number 1?

A. Yes, sir.

Q. I see. It has a railroad spur in here. Would you come in and draw me one of those?

[fol. 418] A. I am not sure where the main line is, the only thing I could do would be—

Q. This is the roadway here, it is where the railroad crosses— This is supposed to be a scale map, now where

in relation to the mud pond does the railroad track go, draw it in.

A. Oh, about right, this right here, on the map, something like that (indicating).

Q. All right. Now, is there another spur?

A. Oh, yes.

Q. Where is that?

A. There has to be one come in on the north side of the factory..

Q. If it comes in from the north side of the factory it will go across pond number 1, north of it or south of it?

A. This pond right over here, they all have to (indicating).

. . . . . .

Q. Now, does this spur continue out to some other places, or is there another spur somewhere else?

A. Well, that plant there isn't separated. The buildings are separated and the spurs run between some of the buildings.

Q. This drawing here is inaccurate in relation to your plant, right?

A. That is right, it is all together, though the buildings are separated, the lines run between some of the buildings, like right here there's a line comes down here on the north side of the building but then there is an opening there just at the plant area and that's our boiler house, lime kiln and warehouse.

Q. I see. Now, is there a railroad spur that goes up and cuts into your—over this way—

A. No, not at all.

[fol. 419] Q. Not at all. Have you ever seen any hunters or trappers walking along that railroad spur?

A. No, sir.

Q. Have you ever seen any traps upon the premises at any time?

A. No, sir.

Q. Do you know whether or not the law requires that the traps have metal tags—

Mr. Smith: Just a second. Object to that.

Q. I was just going to ask him some questions.

Mr. Smith: It is the law, not what the laymen consider it to be.

The Court: He is just asking him about his knowledge, he is not asking him what the law is.

Q. Do you know whether or not the law requires the placing of a tag upon each trap and the name of the owner?

A. No, sir, I don't.

Q. You don't know. How far out of the ground do these no trespassing signs stick up?

A. Probably at least 2½ or 3 feet.

Q. 2½ to 3 foot.

A. That is on stakes.

Q. On stakes. Well now, would you say that brush, you say that was 5 or 6 feet.

A. That's on open ground.

Q. On open ground. Down on the railroad right-of way, is that where you mean?

A. Something like that or on the dike, on the main, on the flat part of the dike, on top.

Q. On top. Well, could you see those signs at all from the railroad?

A. Possibly.

Q. I thought you told me yesterday that the weeds were 6 to 8 feet high on the edge of the road?

[fol. 420] A. That's right.

Q. Are they?

A. Sometimes.

Q. Well, on December 21, 1958, you were out there a day or two afterward, what was the condition of the weeds?

A. Probably was down.

* * * * * * *

Q. During the year 1958 did you ever discuss with Mr. Max Meisner about the—oh, I will withdraw that.

How often did you instruct Mr. Meisner or any person to place any signs upon the premises?

A. Those signs are all posted on stakes or on trees or poles, whatever—

Q. How many times a year?

A. At least twice during the season when there is water in the ponds, from there on it's a catch as catch can proposition in keeping them up. If we miss we pass orders to replace them.

Q. Now, why do you put them up in the springtime?

A. We still have water.

Q. Don't you put them up in April or May?

A. Yes.

Q. There is no water in the ponds then, is there?

A. Yes, it depends. If the Bay, if the Bay is satisfactory, the Water Resources allows us to empty the ponds before then, sometimes that happens, sometimes not. We are governed there by when the ice leaves, when the Bay is open, and how much water we can deliver to the Bay.

Q. What is the latest you ever have, in 1950—, in the spring of '58 when was the last of the water out of the ponds?

A. I don't remember.

[fol. 421] Q. When did you have the signs put up in the spring of that year, do you remember?

A. Can't remember.

Q. What is the object of putting the signs up in the spring, do you know?

A. We still have water in the ponds.

* * * * * * *

Q. Now, did you ever give permission to anybody to hunt on the pond area?

A. Never have.

Q. Did you ever give permission to anybody to trap on it?

A. No, sir.

Q. You knew then, even though you put no trespassing signs, that people trespassed upon the pond areas?

A. Only that Max would tell me that he had seen tracks or something like that.

Mr. Smith: We would ask that be stricken, your Honor, as hearsay.

Mr. Pillon: It is not hearsay when their own employee tells it.

The Court: Well, it is not hearsay, he is not quoting the conversation, he is quoting the notice that he got from his employee—I will permit it to stand.

* * * * * * *

[fol. 424]

CHARGE OF THE COURT

Ladies and gentlemen of the jury:

* * * * * * *

As you know, this is a civil damage suit based upon the laws and principles of negligence, in which the plaintiff Donald Heider, administrator of the estate of David Heider, deceased, is suing the defendant Michigan Sugar Company, a Michigan corporation, for $200,000 damages.

It is undisputed in the case that David Heider met his death on December 21, 1958, as a result of drowning in the pond of the defendant Michigan Sugar Company and on the premises of the defendant in Sebewaing, Michigan.

I am going to state to you briefly the theories or claims of the respective parties in this case.

In stating these claims, I express no opinion as to what the facts are because you are the sole judges of the facts. If I should insufficiently or inaccurately state any particular fact in this case, you will disregard that because you alone are the judges of the facts.

Briefly, on the basis of the claims in this case, it is the position and the contention of the plaintiff here, Mr. [fol. 425] Donald Heider, administrator of the estate of his deceased son, David Heider, that he brings this lawsuit to recover for any losses his wife or he have sustained as a

result of the wrongful death caused by the defendant's carelessness or negligence.

The facts claimed by the plaintiff are that on Sunday, December 21, 1958, David Heider went to his grandparents' home and shortly thereafter left with his older brother Jim and their dog to set traps for muskrat and mink. The two boys and the dog rode a bike over to the railroad that cuts across the defendant's property and there some distance from the road they left their bike, that it was in the afternoon approximately 4 o'clock, that they walked down the railroad track and up an embankment onto pond 3, that their tracks crisscrossed back and forth across the pond and that at least on one occasion a stick or some device was used to test an area near the pond for muskrat holes in order to set a trap, that when coming from the west side of the pond on the center island toward the east bank in a northeast direction, they came to the area where they met their death, that the pond was frozen solid except in the area where they drowned, that the tracks led into foam covered ice and snow, where they ended, that this foam floated on top of the water coming out from the defendant's overflow pipe, and on top of the water it became intermingled with the snow and froze, that the defendant admitted that it knew of this condition.

Plaintiff further claims that there were no warning signs of any type setting forth the danger and that the children were trapped and misled to their death, that the defendant knew that around the water intake the foam accumulated and froze but the water did not, that underneath there was no solid ice.

[fol. 426] Plaintiff futher claims that it was approximately 12 degrees below zero, Saginaw Bay was frozen over, so that cars could drive thereon.

Plaintiff further claims that the area on the ponds and around the ponds, owned by the defendant, was openly used by the citizens of Sebewaing and others as a common

hunting and trapping area, and that in fact three children had set traps upon the defendant's property and in fact it was common knowledge among trappers in Sebewaing that this is an excellent trapping area.

Plaintiff further claims that defendant knew, or should have known, that hunters and trappers came upon the land and that they could reasonably foresee that some of these hunters or trappers would be minors.

Plaintiff claims further that on this occasion there were no signs up indicating no trespassing.

Plaintiff also claims that even if the signs were up, the defendant knew that hunters and trappers ignored the signs and went on the property with great regularity during the hunting and trapping season, and had made no real effort to stop the use of this land.

Plaintiff claims that by merely picking up muskrat traps wrongfully placed on the defendant's land, defendant could have discouraged the use of its property, that nevertheless the defendant maintained an unsafe condition dangerous to human life, without putting up any warning signs or erecting any fence or barricade, the cost of which would have been insignificant compared to the value of human life.

The plaintiff further contends that the conditions that existed on the ice that day were deceptive and ones which would take a person of considerable experience on ice to recognize.

[fol. 427] Plaintiff further claims that as a result of the defendant's lack of care and carelessness, he has sustained damages, that is, the cost of raising and maintaining David, the functioning of David as a member of the family unit, and the companionship of David.

Plaintiff further contends that he himself has a limited life expectancy and that David was the type of boy, if he had lived, who would have helped support his mother as long as she needed it, and that David was a dependable boy who undoubtedly would have been a big help to his

mother, and therefore, in view of the claimed circumstances, plaintiff is entitled to recover damages from the defendant, according you understand to the claims of the plaintiff in this case.

The defendant Michigan Sugar Company on the other hand claims that it maintained its premises in a manner accepted as proper in the industry and as required by the Water Resources Commission of the State, that the pipe emptying from the lime pond into pond 3 was properly constructed and presented no hazard or dangerous condition, that the open area of water around the mouth of the pipe where it discharged into pond 3 was both visible and audible to a person of reasonable prudence, even though of the age of the deceased children, that the foam in the area of the pipe was identifiable as foam, and that a person of reasonable prudence, even children, could and should have so identified it, that the windrow of foam described by the witnesses was sufficient notice to the children of the presence of a condition requiring their investigation before proceeding on or into it, and that the children were aware that the ice thinned out in the area, as was evidenced by the test holes made in the ice by their pole or stick, and that therefore [fol. 428] the area was not one which presented any hazard beyond that presented by ice on any pond or stream, all of which are subject to various thicknesses of ice depending upon wind and wave and current.

The defendant further claims that the pond was in an isolated area of the tract consisting of approximately 100 acres, that the whole area was segregated from public contact by dikes themselves which were varying heights of from 4 to 8 feet, and that the ponds generally and this pond in particular, was accessible to law-abiding persons only through the entrance at the access road, one-fourth to one-half mile from the pond in question, and that therefore the defendant had no knowledge of and no reason to believe that trespassing children would

come upon the premises at the time of year and under the conditions then prevailing.

The defendant further claims that no obligation existed on its part to have watchmen or fencing or other barriers around the pond in question because it was not a dangerous situation requiring such safeguards, and further, because the defendant had no reason to believe that children of the age of the deceased would be in the vicinity or would be venturing upon the ice in the area of pond 3.

The defendant further claims that there was no duty on its part to anticipate that the children would gain access to its premises at the time and place in question by trespassing upon the railroad right of way and thereafter, trespassing on defendant's premises.

The defendant further claims that it was the duty of the parent and of the grandparents who were the custodian of the children to be aware of their intentions to trespass on defendant's property, and to exercise reason-[fol. 429] able care in warning the children of the fact that trespassing was improper and that if they went upon the defendant's property they would be doing wrong, that this was particularly true of the grandfather and grandmother Heider, who testified that they knew where the children were going and for what purpose.

Therefore, defendant claims that the defendant was not negligent;

Two, that the boys were contributorily negligent;

Three, that the parents were contributorily negligent;

Four, that the grandparents were contributorily negligent.

That under all the circumstances the defendant is not liable in any amount to the plaintiff in this case, according you understand to the claims of the defendant in this trial.

Now, those are the conflicting claims of the plaintiff and the defendant respectively in this case and they in-

dicate quite clearly to you the basic questions of fact for your determination here.

You understand that in giving these claims of the plaintiff and the defendant I have stated them in a general way and I am not attempting to state them fully or in complete detail.

In a general way, however, they are the claims of the parties and they raise the disputed questions of fact which are left to you as jurors to determine, you being the exclusive judges of all questions of fact in this case.

• • • • • • •

[fol. 431] In considering the alleged negligence of the defendant here, it is the law that one who maintains on his premises an artificial condition is liable for resulting injury to young children present thereof, if

A, the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

B, the condition is one which the possessor knows or should know, which he realizes or should realize, as involving an unreasonable risk of death or serious bodily injury to such children, and

C, the children because of their youth do not discover the condition or realize the risk involved in their intermeddling in it or in coming within the area made dangerous by it, and

D, the utility to the possessor of maintaining the condition is slight as compared to the risk of young children involved therein.

[fol. 432] In applying those foregoing rules, whether plaintiff was on the defendant's premises by express or implied invitation or by acquiescence of the defendant, or contrary to the defendant's wishes and as a trespasser,

is immaterial to plaintiff's right to recover, if plaintiff has established by a fair preponderance of the evidence, each of the foregoing conditions.

It is not enough that the owner of the land has posted notices to the effect that trespass is not permitted or that trespassers will be prosecuted.

If he knows, or has reason to know, that such notices are disregarded, either as a matter of general custom or at the particular place, he is required to take into account the probable presence of trespassers within such area, and to conduct his activities with reasonable regard for their safety.

The test to be applied in a case of this kind is whether a reasonably prudent person should have anticipated the presence of children or other persons at a place where the defendant created a condition that this jury finds was dangerous.

Children wherever they go must be expected to act upon childish impulses and instincts and others who are chargeable with a duty of care and caution toward them must calculate upon this and take precautions accordingly.

The defendant Michigan Sugar Company is under an obligation to know the condition or conditions of its premises. It is no defense that the defendant had its premises because it must use reasonable means to know the conditions of the premises and to use reasonable care in maintaining them.

[fol. 433] The greater the danger the more care must be exercised and under any circumstances the defendant must use such reasonable care as to make a dangerous condition as safe as the defendant can reasonably do, without being excessively burdensome under all the surrounding circumstances, and the conditions prevailing.

Further, if you find that the boys were trespassers, and the defendant Michigan Sugar Company knew or should have known that children trespass, the Michigan Sugar Company would be responsible and liable for failure to

carry on an activity involving a risk to such children without reasonable care for their safety.

There is a duty placed by law upon the defendant in relation to children whom defendant knew or should have known were trespassing upon the defendant's premises, that requires defendant to use reasonable care for their safety.

I charge you further, members of the jury, that the deceased James Heider and David Heider were both trespassers upon the property of the Michigan Sugar Company, and as trespassers, the defendant Michigan Sugar Company owned no duty to them unless and until it became aware of their presence upon the property on which they were trespassing or unless from all the circumstances here presented in evidence to show that their presence upon the property should have been known to the Michigan Sugar Company, you conclude that the defendant should have known that the children were likely to trespass upon the premises and more particularly, upon the portion of the Michigan Sugar Company premises where the deceased children met their death.

I charge you further that before you can find the defendant Michigan Sugar Company negligent in this case, [fol. 434] you must find that the deceased children did not discover the condition that existed at the time and did not realize the risk involved in intermeddling in it, or coming within the area made dangerous by it.

I charge you further that before you can find Michigan Sugar Company guilty of negligence in this case, you must find that the ponds constructed and more particularly, the pond in question, where the children drowned, were of slight utility to the Michigan Sugar Company as compared to the risk to the young children.

In this connection, you must keep in mind and consider whether the defendant company in the construction or maintenance of the pond created a hazard which was unnecessary to the operation of the pond area and which

would be likely to cause injury to trespassing children known to the company or whom the company should have known would be likely to come upon the pond area.

If a dangerous condition exists, the Michigan Sugar Company is not required to maintain any safety device or warning system if the cost of such would be an unreasonable burden financially.

• • • • • • •

[fol. 436] I will say further in this connection that in the absence of evidence to the contrary, the law presumes that the deceased children did everything that reasonable and prudent children of that age would have done under the same circumstances for their own safety.

In other words, until the contrary is proved, there is a presumption that the minor children were using due and proper care of ordinary children of those ages for the protection of their own safety and the preservation of their own lives at the time of their drowning.

This presumption arises from the instinct of self-preservation and the disposition to avoid personal harm. This presumption is not conclusive but is a matter to be considered by the jury in connection with all the other facts and circumstances in the case, in determining whether or not the deceased children were guilty of contributory negligence at the time of the accident, as the defendant claims that they were.

• • • • • • •

[fol. 442]. You will answer each of these three questions. Each of the jurors will sign the sheet of paper which you will take with you to the jury room and the foreman will present the paper containing your answers and signatures to the clerk of the court at the conclusion of the verdict in this case after you have reached your general verdict.

VERDICT

(Jury returned a verdict in favor of the plaintiff Donald Heider in sum of $125,000.)

[fol. 443]

IN THE SUPREME COURT OF MICHIGAN

DONALD HEIDER, Administrator for the Estate of James D. Heider, Deceased, Plaintiff and Appellee,

v.

MICHIGAN SUGAR COMPANY, a Michigan corporation, Defendant and Appellant.

DONALD HEIDER, Administrator for the Estate of David Heider, Deceased, Plaintiff and Appellee,

v.

MICHIGAN SUGAR COMPANY, a Michigan corporation, Defendant and Appellant.

OPINION—May 10, 1965

Before the Entire Bench.

Kelly, J.

Plaintiff brings these companion cases under the Death by Wrongful Act statute (CL 1948, § 691.581 [Stat Ann 1959 Cum Supp § 27.711]), claiming that his sons James (12½ years of age) and David (8 years of age) were drowned in a pond on defendant's premises and that their deaths were caused by defendant's negligence.

Plaintiff demanded a jury only in the David Heider case, and defendant's request for jury trial in the James Heider case was denied. The cases were consolidated for trial, one a jury case and the other a nonjury case.

[fol. 444] At the conclusion of plaintiff's proofs, defendant moved for a directed verdict "for the reason that the plaintiffs have failed to produce evidence • • • that would tend to establish any responsibility on the defendant for

the death of the children." The court took the motion under advisement and reserved decision in accordance with the terms of the Empson Act.

February 15, 1961, the jury returned a verdict in favor of the plaintiff-administrator of the David Heider estate in the sum of $125,000.

February 28, 1961, defendant filed its motions for new trial and for judgment notwithstanding verdict, on the grounds that the verdict was against the clear preponderance of the evidence, contrary to the great weight of the evidence, and clearly excessive.

May 17, 1962, the trial court directed the entry of a judgment in the nonjury case of James Heider in the amount of $40,989.65, and on the same date denied defendant's February 28, 1961, motions for new trial and judgment notwithstanding verdict in the David Heider case, said motions having been under consideration by the court during the time he was deliberating on the James Heider nonjury case. Defendant then moved for new trial in the nonjury case and this also was denied, the court relying on its opinion denying the motions in the David Heider case.

Question No. 1: *Was the Verdict and Judgment in Each Case Against the Clear Preponderance of the Evidence and Contrary to the Great Weight of the Evidence?*

[fol. 445] James and David Heider were half-brothers and did not live together. James was raised by and lived with his grandparents since he was 8 days old. His mother and father (plaintiff Donald Heider) were divorced and the father contributed nothing to James' support.

David, the younger, lived with his mother and younger brother and sister 3 blocks from the grandparents' home, in Sebewaing, Michigan.

The father, plaintiff Donald Heider, was in Jackson prison serving a sentence of from 10 to 20 years on an armed robbery conviction at the time of the accident.

Defendant's 200 acre tract of land is located north of the village limits of Sebewaing. In order to conduct its sugar beet processing operation, it was necessary to prevent

beet particles and waste containing limestone, calcium carbonate, et cetera, from running into the Saginaw bay. To meet this problem and the requirements of the Water Resources Commission, defendant, in 1944, commenced building a series of auxiliary ponds which finally culminated in 8 ponds, varying in size from 5.9 acres to 27.1 acres. The ponds are separated by dikes 12 feet high and wide enough to accommodate a motor vehicle for travel. There are no public roads on defendant's premises.

The pond in which the boys drowned was known as pond No. 3, 27.1 acres in size and, at the time of the accident, was around 7 feet deep. Said pond was located approximately in the center of defendant's tract of land.

[fol. 446] A pipe approximately 4 feet from the top of the embankment of pond no. 3 emptied water and waste products into the pond. This chemical waste prevented freezing at the outlet and covered the surface of the water with a foamy substance for an area of 10 feet by 8 feet.

Sunday afternoon (December 21, 1958) the 2 boys left the home of their grandparents about 3:30 p.m., in subzero weather, informing the grandparents they were going to trap muskrats. When they failed to return, the grandmother conducted a search, to no avail. The marshal of Sebewaing was notified and the marshal, firemen, and citizens of Sebewaing conducted a search for well over an hour before any one thought of the possibility of the boys *going onto defendant's* property.

A bicycle was found on the C & O Railroad right-of-way 300 feet north of the public roadway and footprints led from this point along the tracks for about half a mile, then across a ditch to an island in the center of pond No. 3 and, after circling about, the steps led to the point where the pipe was emptying into the pond. There was a bunch of frozen foam about 3 feet from where the footprints ended.

The court in a written opinion held that the cause of death was the negligence of defendants in the maintenance of its premises contrary to legal principles, stating:

"Although none of defendant's employees was shown to have specific knowledge that children trespassed upon defendant's premises to trap, they knew that trespassers came upon defendant's land during the hunting and trapping seasons and that traps were set at the ponds to catch muskrats which frequented them and actually did considerable damage to company prop- [fol. 447] erty by digging holes in defendant's dikes. Defendant company put up 'no trespassing' signs at least twice a year but knew they did not remain in place and often were ignored. * * *

"On the basis of a careful consideration of all the evidence and the now well established law of this State, this court concludes that neither the 2 boys nor their guardians were guilty of contributory negligence in this case and that the sole, proximate cause of their deaths in this tragic accident was the negligence of the defendant company in the maintenance of its premises contrary to the following legal principle:

"'A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.' (Lyshak v. City of Detroit, 351 Mich 230; *Nielsen* v. Henry H. Stevens, Inc., 359 Mich 130; 2 Restatement of Torts, §§ 334, 339)."

The trial court's misinterpretation of our Lyshak and Nielsen decisions, *supra,* requires emphasis that the legal principle enunciated in these opinions was that defendant in each instance was aware of the fact that infant trespassers were subjecting themselves to danger upon defendant's property. To establish this important point beyond question, not only in regard to this opinion but for future reference, the following excerpts from Justice Talbot Smith's opinion in Lyshak are set forth:

"The main thrust of plaintiff's argument on appeal is devoted to the proposition that defendant city knew that children 'were constantly coming onto the golf course during the summer months, just as they had been doing for over a long period of time.' From this knowledge, says plaintiff, there arose 'a duty on the part of defendant city of Detroit to keep a lookout for such children who might be on the golf course and, in the exercise of ordinary care, to discover their presence and the presence of infant plaintiff in a dangerous situation as presented itself on the day infant plaintiff was injured and exposed to the danger and peril of being struck by a flying golf ball.' * * *

"It is clear that the plaintiff himself was not on the golf course as a matter of right. * * * A powerfully-driven golf ball in flight is a projectile of lethal qualities, as this record amply demonstrates. * * * The difference between a golf course and a rifle range, then, as a playground for children, is a difference of degree [fol. 448] only.

"If duty is born of danger, the duty of the city of Detroit, knowing that children frequent a certain area, is clear. * * *

"To what degree does the landowner still wear the feudal mantle of special privilege, exempting him from the ordinary rules of negligence when children (yes, trespassing children) are known to frequent land upon which he is carrying on an enterprise hazardous to them? Can he simply say, 'They are trespassers' and continue as if they were not there? Can a landowner blindly throw the firing lever and explode blasting charges in a vacant lot that, to his knowledge, is used daily as a playground by (trespassing) neighborhood children? * * *

"A distinction has been drawn between the mere condition of the premises (a child falls into a natural pond) and a dangerous situation on the premises caused by the active intervention, the affirmative acts,

of the owner (the child is carelessly run down by the owner's horse and buggy). * * *

"We have mentioned, but we have not emphasized, the distinction between an injury arising from a condition of the premises and one arising from affirmative dangerous conduct by the owner. * * * In the interests of accuracy, it should be pointed out that the case before us does not involve injury from the mere physical condition of the premises, whether natural or artificial, and hence many of the cases cited by the city against recovery (e.g., Hargreaves v. Deacon, 25 Mich 1; Graves v. Dachille, 328 Mich 69) are not precedent for the situation before us. Here we have injury from dangerous activities conducted in a limited area which trespassers in general are known to frequent. * * * Upon these facts, infant plaintiff, even if a trespasser, was a known trespasser."

Justices Dethmers and Edwards wrote concurring opinions in the Lyshak Case. Justice Dethmers emphasized the fact that the defendant's awareness of the infant trespasser was a controlling feature, stating:

"Here defendants knew of the presence of small children within the range of a flying golf ball before the foursome. Whether, under such circumstances, it was negligence to drive or permit the driving of a ball in the direction of such small children presented, as I think, a question of fact for the jury."

Justice Edwards, while stating that Lyshak overruled cases "where Michigan has barred recovery for injuries [fol. 449] involving infant trespass—holding the effect of child trespass to be identical with that of adult trespass," also said: "This case concerns a child of tender years—obviously too young to look out for himself. His presence in a place of potential danger, beside a golf course fairway, was known to agents of defendant who were on the tee

at the time the golf ball was driven, which caused the loss of the boy's eye."

In Nielsen v. Henry H. Stevens, Inc., 359 Mich 130 (relied upon by the trial court), a 7-year old boy was injured when defendant's truck collided with the boy's bicycle while he was riding it in a concreted area owned by defendant. This case had been tried and determined in the lower court prior to the Lyshak Case. It was sent back for a new trial, but the fact that defendant knew of the child's presence on its property was made clear by Justice Edwards when he stated:

> "In *Lyshak,* as in the instant case, the Court was dealing with a fact situation where plaintiff alleged active negligence on the part of the defendant toward a minor child whose presence on defendant's property in a place of danger was known to defendant."

Lyshak referred to, but did not repudiate, our early 1872 decision in Hargreaves v. Deacon, 25 Mich 1, where we held:

> "Owners of private property are not responsible for injuries caused by leaving a dangerous place thereon —but not immediately adjoining a highway—unguarded, where the person injured was not on the premises by permission, or on business, or other lawful occasion, and had no right to be there."

Likewise, Lyshak referred to our 1950 Graves decision* but, again, did not overrule or repudiate this decision, but [fol. 450] merely stated that the facts in Graves "are not precedent for the situation before us." In the Graves Case we considered the question of whether damages should be awarded in an action for the death of a 6½ year old boy by drowning in stagnant water which had accumulated in

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* Graves v. Dachille, 328 Mich 69.

a sump on defendants' property incident to an excavation operation. After stating (p 74), "We do not find in the record that to defendants' knowledge any boy had previously gone swimming in this sump, or that anyone had ever called to defendants' attention that such might happen with fatal results," we held that the trial judge had erroneously denied defendants' motion for a directed verdict because of the absence of proof that would justify a jury finding that defendants were *guilty of gross negligence.*

Lyshak overruled cases referring to defendant's responsibility to trespassers *only* where the facts disclose that defendant owner was aware that child trespassers were entering his property and subjecting themselves to danger and possible harm.

Prior to Lyshak, decisions of this Court did not distinguish between a child and an adult trespasser. In Ryan v. Towar, 128 Mich 463, which was referred to with approval in Petrak v. Cooke Contracting Co., 329 Mich 564, it was held: (1) An invitation or a license to cross the premises of another cannot be predicated on the mere fact that no steps have been taken to interfere with such practice; (2) There is no difference between children and adults as to the circumstances that will warrant the inference of an invitation or a license to enter upon another's premises; and (3) The owner of land is not liable to trespassers thereon [fol. 451] for injuries sustained by them not due to his wanton or wilful acts.

The trial court in the present case erroneously concluded that while it was not shown that defendant's employees had "knowledge that children trespassed upon defendant's premises to trap," he could apply the principle of Lyshak and Nielsen, *supra,* because "they knew that trespassers came upon defendant's land during the hunting and trapping season."

In the recent case of Slinker v. Wallner (1960), 258 Minn 243 (103 NW2d 377), the Minnesota supreme court upheld a directed verdict for the defendant by the trial court in

an action for the wrongful death of a child by drowning, stating (pp 248, 251):

> "In upholding recovery in these cases we have gone a long way in placing responsibility upon the occupier of premises to safeguard trespassing children. However, there must come a point where liability does not exist as a matter of law unless occupiers of land are to be held liable merely because children might stray onto their premises. It would seem that reasonable foreseeability is and must be a necessary prerequisite to liability. * * *
>
> "Here the record is completely devoid of any evidence from which an inference could reasonably be drawn that the owners or occupiers of the premises involved knew or had any reason to know that children could be expected to play on these grounds any more than it is generally known that they might be found anywhere."

"Reasonable foreseeability" as a necessary prerequisite to liability is not established in this record, which is completely devoid of any evidence from which an inference could be drawn that defendant owner knew, or had any reason to know, that infant children would be trapping, playing, or trespassing upon the property.

[fol. 452] The record sustains appellant's statement:

> "The pond in question was approximately a quarter of a mile from the nearest highway. A more desolate area could not be imagined. It was mid-winter and below zero weather. There was no reason to believe children would be in the vicinity. No employee of the defendant company had ever seen children trespassing on its premises or had specific knowledge that children trespassed thereon, as is conceded by the trial judge."

In the 1951 Petrak decision, *supra*, we considered whether defendant-owner of road-making equipment was liable for

the death of an 11-year old boy who was killed when a 1,500 to 2,000 pound beam fell on him while he and another boy were playing with a barrel of tar. In upholding a directed verdict for defendant, we, after establishing the principle that the attractive nuisance doctrine is conservatively applied in this State, said: "A reasonably prudent person would not anticipate that children in the vicinity would be likely to play with the trailer."

Applying the principles established in Petrak, we can and should conclude that "a reasonably prudent person would not anticipate" the tragic events that led up to the death of the 2 boys on defendant's premises.

We conclude that under the evidence in this record and under the decisions of this Court, including Lyshak and Nielsen, *supra,* the judgment in each case was against the clear preponderance and contrary to the great weight of the evidence.

Question No. 2: *Should the Provisions of PA 1953, No. 201* (CLS 1956, § 300.201 [Stat Ann 1958 Rev § 13.1485]) *Be Considered by This Court When Said Statute Was Not* [fol. 453] *Raised in the Pleadings, Nor at the Trial, in the Motion for New Trial, or in Reasons and Grounds for Appeal?*

PA 1953, No 201, provides:

> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission, against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

Appellant states:

> "Candor compels our admission that this statute escaped the attention of this brief writer until it was

noted in the December 8, 1962 publication of the Negligence Law Section Bulletin of the State Bar of Michigan. It is cited nowhere in the Michigan Reports. We think the force of the enactment is to deprive the plaintiff of any cause of action under the proofs in this case. It is not a matter of affirmative defense nor of limitation. Its language is to abolish any such cause of action. It has no limitation. The cause of action no longer exists. It applies to 'any person'. The statute in question expresses the public policy of the State. It places the law with reference to trespassing hunters, fishermen and trappers, including minors, where it was prior to the more recent adjudications dealing with trespassing children and beginning with *Lyshak* v. *City of Detroit,* 351 Mich 230."

Appellee objects to consideration of the statute by this Court in this appeal because it was not raised in the pleadings, nor at trial, motion for new trial, or in the reasons and grounds for appeal; that it is an affirmative defense and cannot be raised as part of the general issues.

My answer to Question No. 1 discloses that without the application of this statute, on the record submitted, the verdict and judgment in each case should be set aside, but as this opinion is written before acceptance or rejection by my Associates, I am answering Question No. 2. [fol. 454] The general rule is well established that upon appellate review, parties cannot assume a position inconsistent with or different from that taken at the trial and are restricted to the theory upon which the case was defended in the court below.

This rule has its exceptions, and in Dation v. Ford Motor Co., 314 Mich 152, we held that the general rule that a question may not be raised for the first time on appeal to the Supreme Court is not inflexible and will not be applied when consideration of a claim sought to be raised is necessary to a proper determination of the case.

Especially is this true where an applicable statute has been overlooked. It has been held that the party's failure to call the trial court's attention to a relevant statute does not preclude the appellate court from considering it.*

There is no claim in this case that defendant was guilty of gross negligence or wilful and wanton misconduct. There is no testimony that even infers that permission was given to the boys, or that a valuable consideration was paid by them for the privilege of going upon defendant's premises.

The statute states there must be proof of (1) payment of a valuable consideration, or (2) proof of gross negligence or wilful and wanton misconduct before a party who [fol. 455] is on the land of another for fishing, hunting or trapping can seek damages for injuries. In the absence of proof sustaining one of these requirements, the statute specifically states "no cause of action shall arise."

The total lack of proof to meet any of these requirements makes this statute applicable and should be considered by this Court as one more reason why the conclusion reached in answer to Question No. 1 should also be the answer to Question No. 2.

The cases are reversed and remanded to the lower court for entry of judgments of no cause of action. Defendant may recover costs.

John R. Dethmers, Concurred with Kelly, J.

[fol. 456] CONCURRING OPINION

O'Hara, J.

I am obligated to vote to reverse with instructions to enter an order dismissing the declarations for failure to state a cause of action of which the court had jurisdiction. This is for the reason that the legislature abolished the

* See 4 CJS, Appeal and Error, §§241, 242; Adley Express Co., Inc. v. Town of Darien, 125 Conn 501 (7 A2d 446); Bedenbaugh v. Adams (Fla., 1956), 88 So2d 765; Yannuzzi v. United States Casualty Co., 19 NJ 201 (115 A2d 557); Huntress v. Huntress' Estate (7 CCA Ill), 235 F2d 205 (61 ALR2d 682).

cause of action here sought to be asserted. Fairly read, it seems to me the whole thrust of the declarations is that [fol. 457] the boys entered upon the property of the defendant to trap; that defendant had knowledge that many people did so and that defendant was ordinarily negligent in the maintenance of the premises.[1] Altering the order of the paragraphs merely for clarity, the pleadings read:

> "27. That David Heider is the minor son of the plaintiff, Donald Heider, and on the 21st day of December, 1958 said son with his brother, James Donald Heider *and their dog set out muskrat trapping.*
>
> "28. That David Heider with his brother and dog entered the defendant's premises and walked onto one of the defendant chemical ponds.
>
> "5. That the defendant knew persons came on their land where their artificial storage ponds are located to trap for muskrats, mink, etc.
>
> "21. That the defendant failed to have any warning signs and failed to maintain the property to protect children." (Emphasis this Court's.)

The wording is identical in the companion case.

The statute[2] involved is herewith set out in its entirety:

> "AN ACT restricting suits by persons coming upon the property of another for the purpose of hunting, fishing or trapping; and to declare the limited liability of owners of property within this state.
>
> "*The People of the State of Michigan enact:*
>
> "300.201 Prohibiting tort actions against landowners for recovery of damages, unless caused by negligence, etc. of owner, tenant or lessee. [M.S.A. 13.1485]

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[1] In view of the statute, it matters not whether the boys were licensees, invitees or trespassers.

[2] PA 1953, No 201 (CLS 1961 § 300.201; Stat Ann 1958 Rev § 13.1485).

[fol. 458] "Sec. 1. *No cause of action shall arise for injuries to any person who is on the lands* of another without paying to such other a valuable consideration for the purpose of *fishing, hunting or trapping, with or without permission,* against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee.

"Approved June 10, 1953." (Emphasis supplied.)

At the time of these unfortunate deaths the Constitution limited the original jurisdiction of our circuit courts to "all matters civil and criminal not excepted in this constitution and not prohibited by law." (Const 1908, Art 7, § 10.[3]

No right or rights of action as pleaded here could have accrued, to the personal representatives of either decedent, the declared acts of defendant *not* being "such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof" (CL 1948, § 691.581).

With or without raising of the question below, the circuit court was possessed of no jurisdiction to hear and determine the merits of plaintiffs' allegations. See the long list of authorities cited in In Re Fraser's Estate, 288 Mich 392, 394 as supporting this settled principle:

> "Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding."

[fol. 459] The principle quoted was applied in Lehman v. Lehman, 312 Mich at 105 and Bank & Trust Co. v. Wayne

[3] For the corresponding present provision, see Const 1963, Art 6, § 13.

Cir. Judge, 321 Mich at 45. It is controlling here; hence my vote as indicated. The situation here is the same as if plaintiff had declared for alienation of affections. Defendant, having failed to raise the jurisdictional question in due time, should not have costs.

Eugene F. Black, Otis M. Smith, Concurred with O'Hara, J.

[fol. 460]

OPINION CONCURRING IN PART AND DISSENTING IN PART

Adams, J.

I am unable to agree with Justice Kelly that the trial court misinterpreted *Lyshak* v. *City of Detroit,* 351 Mich 230, or *Nielsen* v. *Henry H. Stevens, Inc.,* 359 Mich 130. The trial judge found:

> "Defendant company certainly was carrying on a legitimate business enterprise on its own premises. It was quite clear from all the evidence in the case, however, that *an extremely deceptive and treacherous condition existed in the surface of the ice around the pipe discharging water into the pond.* Defendant easily could have employed some sort of a warning device and sign to serve as a notice or caution to *trap-*
> [fol. 461] *pers and trespassers who were known to use that area frequently.* That would not have limited or interfered in any way with defendant's profitable conduct of its business." (Emphasis added.)

There is ample evidence in the record to support the findings of the court and jury that defendant's property was frequented by trappers, hunters, skaters and other trespassers. Richard Jahr, an employee of Michigan Sugar, testified:

> "Q. Do you conduct any activity on these ponds?
> "A. Well, I've trapped them, being within that area I would say for at least 20 years. • • •

"Q. Well, did they give you permission or didn't they?

"A. They actually did not give me permission, he says in his own words, for all of them *they would like to get rid of the muskrats because they do damage on the ponds,* but if I went onto them I was on my own risk.

"Q. Now, have you ever seen any evidence while you are trapping that other people trapped up there? • • •

"A. Yes, I seen others out there trap.

"Q. How many people do you know of that trap out there?

"A. Three that I know of." (Emphasis added.)

Max Meissner, also an employee of Michigan Sugar, testified that he had been aware of the fact that people were trapping in the area and that hunters often used the land in question, as many as 30 or 40 during a hunting season.

Floyd Taylor, a truck driver living in Sebewaing, testified it was common knowledge in the community that the Sugar Company premises were a good area for trapping:

[fol. 462] "Yes, I think that just about everybody that did any trapping around town knew that that was one of the best areas around, to trap."

He testified that his own boy, when 14 and 15 years old, trapped on the ponds. There was also evidence of the presence of children, small footprints having been seen and the ponds having been used for skating.

The trial judge then went on to apply the proper legal principles. Justice Kelly would now restrict the rule "to trespassers *only* where the facts disclose that defendant owner was aware that child trespassers were entering his property and subjecting themselves to danger and possible harm." The requirement of reasonable care for the safety of a trespasser is subject to no such condition. *Swanson* v. *City of Marquette,* 357 Mich 424. I am unable to perceive the legal or lethal difference between a "powerfully driven

golf ball in flight" (*Lyshak*), "a negligently driven truck" (*Nielsen*), "an improperly maintained electrial substation or transformer vault" (*Swanson*), and "an extremely deceptive and treacherous condition * * * in the surface of the ice around the pipe discharging water into the pond."

As Justice Talbot Smith observed in *Lyshak*:

> "We accept as commonplace today the principle that there is a duty upon all men so to conduct their activities as to minimize *the likelihood* of harm to others." (Emphasis added.)

Special findings were made by the jury in answer to the following questions:

> [fol. 463] "Question No. 1—Was the pond where the boys met their death a place where the Michigan Sugar Company knew, or should have known, that children were likely to trespass? [x] Yes [ ] No
>
> "Question No. 2—Was the place where the boys met their death a place where a condition existed which the Michigan Sugar Company knew, or should have known, involved an unreasonable risk of death to child trespassers? [x] Yes [ ] No
>
> "Question No. 3—Was the utility of maintaining the pond by the Michigan Sugar Company in the condition it was slight as compared to the risk to child trespassers as involved there? [x] Yes [ ] No"

Likelihood and foreseeability are much the same thing. I do not disagree with Justice Kelly's quotation of the rule in *Slinker* v. *Wallner*, 258 Minn 243 (103 NW2d 377) (1960), but I do with his interpretation of the facts in these two cases where, in my opinion, likelihood of or foreseeability of possible harm existed before the tragedies occurred.

With regard to the question of damages and whether the awards were excessive or insufficient, it is necessary first of all to determine the persons who would be entitled to

share in recovery. In the case of James D. Heider, the trial court equated the term "pecuniary injury" as used in the wrongful death act (CL 1948, § 691.581 *et seq.* [Stat Ann 1959 Cum Supp § 27.711 *et seq*])* with our former requirement that the beneficiary of the statutory action suffering pecuniary injury be one who was entitled to financial support from the deceased, citing *MacDonald* v. *Quimby,* 350 Mich 21. At the very latest, since our decision in *Wycko* v. [fol. 464] *Gnodtke,* 361 Mich 331, however, we have allowed recovery of damages for pecuniary injury in such actions notwithstanding the absence of an obligation by the deceased to support the person suffering such pecuniary injury. *MacDonald* v. *Quimby* is applicable yet to the extent that it was there held, by all members of the Court, that the persons whose "pecuniary injury" is compensable under the death act are those who, in the variant circumstances of intestate succession, might be entitled to inherit the personal property of one dying intestate. In *MacDonald,* the deceased left surviving him a widow and children, but the Court permitted recovery of the pecuniary injury suffered by deceased's mother notwithstanding the fact that, because deceased left a widow and children surviving him, his mother would not have been entitled to inherit any of his personal estate had he died intestate.

The restriction of the class to Donald Heider, father of James D. Heider, by the trial judge was improper, since, in this case, there were other members of the class who should have been considered. The trial court said:

> "This Court finds from the evidence at the trial that the deceased James Heider had lived long enough to be able to demonstrate much more clearly than his younger brother David the talents, abilities, character, and accomplishments which gave such distinct and definite promise of a useful life and a good citizen. As a con-

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* See, currently, CLS 1961, § 600.2922 (Stat Ann 1962 Rev § 27A.2922).

> sequence, it would seem to follow irrefutably that his death would occasion the greater loss, not only to the community but also to his whole family, and that therefore the damages should be higher in his than in his brother's case. This Court would be inclined to reach such a conclusion as a matter of simple and obvious justice."

Since the court did not make an award to cover the pecu- [fol. 465] niary injury to all of James' next-of-kin, it will be necessary to remand the case for a reconsideration of such award.

Some further comment is appropriate with regard to the assessment of damages which the trial judge did make. He awarded $10,989.65 for the cost of raising James. The sum was incorrectly allocated to Donald Heider, father of James, who did not provide such cost. It should have been allocated to James D. Heider's grandfather, who incurred the cost, and who, being within the statutory class, would be entitled to recover.

The trial judge also awarded $30,000 for loss of the society and companionship of James Heider by his father, Donald Heider, who was 33 years old at the time of the trial. James was the son of his first marriage. His wife deserted the child. Her whereabouts are unknown. Heider contributed nothing to the support of James. He was separated from his second wife. In 1953, he was arrested for nonsupport. In 1957, he pleaded guilty to robbery and was sentenced to the State prison of southern Michigan. He contracted cancer and was discharged from prison July 6, 1959, on special parole. He saw James frequently and went hunting and fishing with him. At the time of trial he had a life expectancy of two to five years. An assessment of $30,000 for the loss of society and companionship by this father upon this record cannot but raise questions. Since the assessment of damages will be redetermined, on remand for further proceedings, we need not determine [fol. 466] whether the award made for loss of the child's

society and companionship by his father was excessive. Upon retrial the court should consider carefully all elements of pecuniary injury suffered by all members of the statutory class and he should issue the certificate authorized by the wrongful death act setting forth the amount of such damages and the proportion thereof which represents the pecuniary loss suffered by each of the members of the statutory class.

In the case of 8-year-old David Heider, the jury awarded damages of $125,000. It is asserted that this sum is excessive, against the clear preponderance of the evidence and contrary to its great weight. Appellant states:

> "Mrs. Heider, with the $125,000, at her present age would be able to purchase an annuity which would pay her a guaranteed monthly income of $455.00 for her lifetime."

The loss of companionship in David's case runs not only to the father and mother but also to a younger brother and sister. The amount of damages recoverable in actions for death by wrongful act is one peculiarly within the province of the jury. Taking into account the total family relationship, the probable dependency of the mother upon David, and the loss to the family group of the life of David over a useful lifetime, we do not find the verdict excessive.

With regard to PA 1953, No 201 (CLS 1961, § 300.201 [Stat Ann 1958 Rev § 13.1485]), I am unable to agree with either Justice Kelly or Justice Black. The declarations do not disclose the applicability of PA 1953, No 201, to bar [fol. 467] plaintiff's asserted causes of action. Paragraphs 4, 5, and 6 of each declaration allege that the defendant knew that people went upon defendant's lands to hunt, trap, fish, and for other purposes; paragraph 27 of each declaration alleges that the two deceased boys and their dog "set out muskrat trapping"; and paragraph 28 of each declaration alleges that the boys and their dog entered the defendant's premises and walked upon one of the defendant's

chemical ponds. Standing alone, such allegations are not sufficient, as it is claimed, to invoke the statutory bar of PA 1953, No 201, on the conclusionary assumption that the boys were "on the lands of another * * * for the purpose of fishing, hunting or trapping." Nor, of course, did the defendant plead any facts from which either the trial court or we properly could conclude that the boys' purpose in going upon defendant's land was one of the purposes named in the statute which would bar the causes of action sought to be asserted. Finally, the record as made below fails to disclose any direct evidence that the boys in fact went upon the defendant's lands to fish, hunt, or trap.

Dation v. *Ford Motor Co.,* 314 Mich 152, is cited by Justice Kelly in support of the proposition that, while usually a question may not be raised for the first time on appeal to the Supreme Court, the rule is not inflexible. In *Dation,* this Court was dealing with an appeal from the workmen's compensation department. A question of law arose upon the appeal which admittedly the department (as a fact finding body) could not settle even if the matter had been remanded to it. The entire question being before [fol. 468] this Court, the Court elected to pass upon it.

The problem has not received uniform treatment. Plaintiff cites *Hollister* v. *Kinyon's Estate,* 195 Mich 261; *Selznick Enterprises* v. *Garson Productions,* 202 Mich 106; *D & W Rottschafer Real Estate* v. *Morris,* 245 Mich 192; and *Shaver* v. *Associated Truck Lines,* 322 Mich 323. Counsel for defendant stress *Morris* v. *Radley,* 306 Mich 689, in support of the exception to the rule and argue that we should apply the exception here to avoid a miscarriage of justice because of the inadvertence of counsel in overlooking and failing to raise the application of the statute before the trial court. This is not a proper case to apply the exception. Only when the matter was presented to the trial judge and he refused to rule, or, under the clearest of circumstances, where it is unquestioned that the entire matter is before this Court, should the exception prevail.

Such is not this case in which the question is first presented here as an afterthought and accorded cursory treatment and briefing. For these reasons it is not applicable at this late juncture in the case of David Heider. Litigation must come to an end. Defendant has had its day in court with ample opportunity to raise and present all defenses. It is not the function of this Court to correct, on review, the inadvertence or failure of counsel to present what might have been a defense.

[fol. 469] In the case of James D. Heider, upon remand the trial court will determine any questions of fact which may be raised and especially the question as to whether he went on "the lands of another * * * for the purpose of fishing, hunting or trapping." The court will also consider and determine any issues with regard to the legality and construction of the act which may be raised, such as whether a minor is a "person" within the meaning of the statute, the word "person" being undefined and subject to construction in the light of a strong public policy favoring the protection of minors; whether the classification of the statute violates the due process clauses of the United States and Michigan Constitutions and the equal protection clause of the United States Constitution.

The judgment in the case of Donald Heider, Administrator for the Estate of James D. Heider, is remanded for consideration of the applicability of PA 1953, No 201, supra, and for possible reassessment of the damages therein. Costs to neither party, each having prevailed in part.

The judgment in the case of Donald Heider, Administrator for the Estate of David Heider, is affirmed. Costs to appellee.

Thomas M. Kavanagh, Theodore Souris, Concurred with Adams, J.

[fol. 470]

IN THE SUPREME COURT OF MICHIGAN

49890

DONALD HEIDER, Adm'r, Plaintiff,

vs.

MICHIGAN SUGAR CO., Defendant and Appellant.

JUDGMENT—May 10, 1965

This cause having been brought to this Court by appeal from Saginaw circuit court, and having been argued by counsel, and due deliberation had thereon, it is now ordered by the Court, that the judgment of the circuit court be and the same is hereby reversed and the cause is remanded for further proceedings in accordance with the opinions filed herein.

[fol. 471]

IN THE SUPREME COURT OF MICHIGAN

49891

DONALD HEIDER, Adm, of Estate of James D. Heider, deceased, Plaintiff,

vs.

MICHIGAN SUGAR COMPANY, Defendant and Appellant.

JUDGMENT—May 10, 1965

This cause having been brought to this Court by appeal from Saginaw circuit court, and having been argued by counsel, and due deliberation had thereon, it is now ordered

by the Court, that the judgment of the circuit court be and the same is hereby reversed and the cause is remanded for further proceedings in accordance with the opinions filed herein.

[fol. 471a]

IN THE SUPREME COURT

Appeal from the Circuit Court for the County of Saginaw
Honorable Eugene Snow Huff, Circuit Judge

Law No. 26686 (1)

DONALD HEIDER, Administrator for the Estate of James D. Heider, Deceased, Plaintiff and Appellee,

v.

MICHIGAN SUGAR COMPANY, a Michigan Corporation, Defendant and Appellant.

Law No. 26687 (3)

DONALD HEIDER, Administrator for the Estate of David Heider, Deceased, Plaintiff and Appellee,

v.

MICHIGAN SUGAR COMPANY, a Michigan Corporation, Defendant and Appellant.

EXCERPTS FROM PLAINTIFF-APPELLEE'S PETITION FOR REHEARING—Filed May 28, 1965

* * * * * * *

[fol. 471b] I.

* * * * * * *

Sec. 300.201; M.S.A. 13.1485, which reads:

"RESTRICTIONS OF SUITS BY HUNTERS, FISHERMEN OR TRAPPERS. Act 201, 1953 p. 281; eff. Oct. 2.

An Act restricting suits by persons coming upon the property of another for the purpose of hunting, fishing

or trapping; and to declare the limited liability of owners of property within this state.

The People of the State of Michigan enact:

13.1485 Limited liability of property owner or tenant to fishermen, hunters or trappers. Section 1. No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission, against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee. (C. L. '48 300.201)"

. . . . . .

[fol. 471c]

XIII.

That the 1953, statute 300.201; M.S.A. 13.1485 is unconstitutional, on its face and as applied, under the State Constitution and the 14th Amendment due process clause and equal protection clause of the United States Constitution in that it creates an unreasonable classification of persons who fish, hunt and trap while leaving unregulated persons engaged in other activities strikingly more harmful to the interest of landowners, that its purpose is solely to protect land occupiers from their own negligence, and that it denies equal protection of the laws to children.

XIV.

That this Court, by its manner of decision here, has denied petitioner his day in Court and due process of law as guaranteed by the Michigan Constitution and by the Fourteenth Amendment to the United States Constitution, in that petitioner was denied opportunity to challenge the constitutionality of the statute held by the Court to be dispositive of these cases, and was allowed no oportunity to show facts which would bring these cases outside

[fol. 471d] of the reach of the statute, since the statute was not pleaded in defense in the trial court, but was raised for the first time in Appellant's brief.

• • • • • • •

[fol. 471e] XV.

That the Statute, C.L.S. 1961, 300.201; M.S.A. 13.1485, was never pleaded in the lower court and thus petitioner was deprived of an opportunity to amend his pleadings, and to present the facts necessary to establish gross negligence, wilful wanton misconduct or that David Heider in fact was not a trapper, that the statute did not apply to children or cover the facts involved and that the statute is unconstitutional.

XVI.

That the effect of this Court's decision is to permit the defendant-appellant to ignore his pleadings, ignore his theory on trial, and raise for the first time on appeal the question of the applicability of Sec. 300.201; M.S.A. 13.1485, which he had completely overlooked earlier, and to force the petitioner to live with his pleadings, drawn without regard to the statute, deprive him of an opportunity to defend against the statute, its interpretation, meaning, application in relation to facts, and deprives plaintiff of his day in court.

• • • • • • •

[fol. 471f] XVIII.

That the statute in question specifies "for injuries" and the instant cases are for death. Death is not synonomous with injuries. The statute being almost penal in nature should be strictly construed.

XIX.

That the statute in question never having been raised below, little or no effort was made to distinguish in the

trial between the activities of James and his younger brother, David.

Excerpts from the record demonstrate that James was the trapper, owned the traps, had permission of his grand parents to set traps (234a, 235a, 236a), James trapped with other older boys of the village of Sebewaing (248a, 250a, 251a).

The record is void as to David specifically trapping.

As a matter of fact, James trapped, David didn't.

Attached hereto are affidavits showing David not only didn't trap, but that likely he was physically unable to trap.

* * * * * * *

[fol. 471g] AFFIDAVITS

Affidavit of Larry Gunsell

State of Michigan,
County of Huron—ss.

Larry Gunsell, being duly sworn, deposes and says as follows:

That he lives at 109 South Third Street, Sebewaing, Michigan and that he is twenty-six years of age.

That he has known James and David Heider since their infancy.

That he has had occasion to hunt and trap on the Michigan Sugar Company and other areas near Sebewaing.

That he has witnessed James Heider when the boy was trapping muskrats and several times had seen David Heider accompanying James on these missions.

That when he saw these two boys together only James carried the traps.

That he had occasion to observe these boys in their actions and that only James Heider operated and set the traps and that David Heider gave the appearance of "tagging along" with the older boy.

That he observed that David Heider usually trailed James Heider by several feet while James was making

his rounds and Deponent remembers particularly that the dog who usually accompanied the boys seemed always to be with David and not with James.

[fol. 471h] That Deponent has an eight year old son, in sound physical condition, and witnessed him attempt to open and set a used muskrat trap and that the boy was unable to do so.

That Deponent's eight year old son, Larry Jr. weighs approximately sixty-seven pounds.

Further Deponent sayeth not.

Larry Gunsell

Subscribed and sworn to before me this 17th day of May, A. D. 1965. I hereby certify that the affiant had read the foregoing statement before signing same.

Joseph E. Maher, Notary Public, Wayne County, Michigan, acting in Huron County. My Commission expires Nov. 17, 1967.

Affidavit of Linda Heider

State of Michigan,
County of Huron—ss.

Linda Heider, being duly sworn deposes and says as follows:

That she is nine years of age and is the daughter of Donald and Beatrice Heider.

That she understands that she must tell the truth.

That she weighs seventy-eight pounds and that she is physically sound.

[fol. 471i] That on this date she attempted to open and set a small animal trap of the type used for muskrat trapping and was unable to do so.

That she used the full force of her weight on several such traps and was unable to force open any one of them.

Linda Heider

Subscribed and sworn to before me this 17th day of May, A. D. 1965. I hereby certify that the affiant had read and stated she understood the foregoing statement before signing same.

Joseph E. Maher, Notary Public, Wayne County, Michigan, acting in Huron County. My commission expires Nov. 17, 1967.

Affidavit of Beatrice Heider

State of Michigan,
County of Huron—ss.

Beatrice Heider, being duly sworn, deposes and says as follows:

That on this date she witnessed an attempt by her daughter to open several small animal traps such as the type used for trapping muskrats and observed that she was unable to open any of them although she tried very hard to do so.

That her daughter Linda weighs approximately seventy-eight pounds and appeared to use the full force of her weight in attempting to open said traps.

[fol. 471j] That on the date of his death, David Heider weighed approximately sixty-three pounds.

Beatrice Heider

Subscribed and sworn to before me this 17th day of May, A. D. 1965.

Joseph E. Maher, Notary Public, Wayne County, Michigan, acting in Huron County. My commission expires Nov. 17, 1967.

Affidavit of Vivian A. Brenner

State of Michigan,
County of Huron—ss.

Vivian A. Brenner, being duly sworn, deposes and says as follows:

That she lives at 103 South Fifth Street, Sebewaing, Michigan.

That she has known the Heider family for over twenty years and has been a frequent visitor in the home of Donald and Beatrice Heider and is their neighbor.

That she has known David Heider from the day of his birth to the day of his death on December 21st, 1958 and saw him frequently during that time.

That, to her knowledge, David Heider, had never trapped animals nor was he the possessor or owner of any animal traps and that she never observed any animal traps around the Heider household.

[fol. 471k] That David Heider spent many hours at her house and never spoke of or discussed hunting or trapping.

That had David Heider ever gone trapping she would have known about it, since he confided in her.

That she had never known David Heider to go near the water without proper supervision.

Further Deponent sayeth not.

Vivian A. Brenner

Subscribed and sworn to before me, a Notary Public, this 17th day of May, A. D. 1965. I hereby certify that the affiant had read the above statement before signing same.

Joseph E. Maher, Notary Public, Wayne County, Michigan, acting in Huron County. My commission expires Nov. 17, 1967.

Affidavit of Marion Stoeckl

State of Michigan,
County of Huron—ss.

Marion Stoeckl, being duly sworn, deposes and says as follows:

That she lives at 216 West Sebewaing Street, Sebewaing, Michigan and that she is thirty-one years of age.

That she has known Donald and Beatrice Heider since childhood and has been a frequent visitor at their home since their marriage.

[fol. 471 l] That she knew David Heider since his birth and up to the time of his death and had many opportunities to see and talk with him.

That to the best of her knowledge David Heider had never gone trapping nor did he own or possess any animal traps or trapping equipment.

That she has never seen any animal traps or trapping equipment at the Heider home.

That, at the time of his death, David Heider, who was a slender boy appeared to weigh less than seventy pounds.

Further Deponent sayeth not.

Marion Stoeckl

Subscribed and sworn to before me this 17th day of May, 1965. I certify that the affiant had read the foregoing statement before signing same.

Joseph E. Maher, Notary Public, Wayne County, Michigan, acting in Huron County. My commission expires Nov. 17, 1967.

[fol. 472]

IN THE SUPREME COURT OF MICHIGAN

49890

DONALD HEIDER, Adm'r, Plaintiff,

vs.

MICHIGAN SUGAR Co., Defendant and Appellant.

49891

DONALD HEIDER, Adm'r, Plaintiff,

vs.

MICHIGAN SUGAR Co., Defendant and Appellant.

ORDER DENYING MOTION TO REARGUE—May 17, 1965

On order of the Court, the motion by plaintiff and appellee for permission to reargue this case before the Court is considered, and the same is hereby Denied, as being premature.

[fol. 475]

49890-1

DONALD HEIDER, et al.

vs.

MICHIGAN SUGAR COMPANY.

ORDER DENYING APPLICATION FOR REHEARING—
October 4, 1965

An application for rehearing having heretofore been submitted herein, it is hereby Denied.

Souris and Adams, JJ., dissent.

[fol. 487] Clerk's Certificate (omitted in printing).

[fol. 488]

SUPREME COURT OF THE UNITED STATES

No. 869, October Term, 1965

HERBERT HEIDER, Administrator, etc., Petitioner,

v.

MICHIGAN SUGAR CO.

ORDER ALLOWING CERTIORARI—February 21, 1966

The petition herein for a writ of certiorari to the Supreme Court of the State of Michigan is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. ~~559~~ 48

HERBERT HEIDER, Administrator for the Estate of
JAMES D. HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent,
and
HERBERT HEIDER, Administrator for the Estate of
DAVID HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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Detroit, Michigan 48226,
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Interstate Brief & Record Co., 356 Congress St. E., Detroit, Michigan 48226

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IN THE

Supreme Court of the United States

No. .....

HERBERT HEIDER, Administrator for the Estate of
JAMES D. HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent,
and
HERBERT HEIDER, Administrator for the Estate of
DAVID HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

To: The Supreme Court of the United States:

Herbert Heider, your petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court for the State of Michigan entered in the above causes on October 4, 1965.

OPINIONS BELOW

The opinion of the Circuit Court for the County of Saginaw, Michigan is printed as appendix A, *infra*, and is unreported.

The Michigan Supreme Court's opinion is printed as appendix B, *infra, and is reported* at 375 Michigan 490; 134 Northwestern 2nd 637.

JURISDICTION

The judgment of the Supreme Court of Michigan was dated and entered on May 10, 1965. On May 28, 1965 an application for rehearing was duly submitted and the application for rehearing was denied, dated and entered on October 4, 1965.

The jurisdiction of this Court is invoked under Article III Section 2 of the United States Constitution and under 28 USC 1257.

QUESTIONS PRESENTED

I.

Are the plaintiff's constitutional rights to due process of law under the 14th Amendment to the United States Constitution violated;

1. When the State Supreme Court reverses a cause and renders judgment absolute against the plaintiff, the successful party in the trial court, upon a statute and question of fact that was never before the trial court or not properly

before the State Supreme Court and concerning which the plaintiff had no occasion or opportunity to offer pleadings or evidence, or have a day in Court?

2. By a State Supreme Court considering and rendering a decision based on a statute raised for the first time by brief on appeal?

3. By a State Supreme Court decision which allows defendant to change his legal position while holding plaintiff to his position as set forth in the pleadings, and as tried?

II.

Are the plaintiff's constitutional rights to equal protection of law under the 14th Amendment to the United States Constitution violated,

1. By a Michigan Statute relating to the trespassing individuals who hunt, fish or trap where the plaintiffs-decedents, though minors, are classified within said statute and where such statute is contrary to the common law rights of all minors who have a cause of action even though they may be trespassers?

2. By a Michigan Statute which imposes liability for ordinary negligence only if the minors, age eight and twelve, respectively pay a valuable consideration?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the 14th Amendment to the United States Constitution.

The germane part thereof reads: "* * * nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws".

THE BASIC FACTS

Trial Facts

These causes of action arose for the wrongful death of two boys, David Heider, age eight and James Heider, age twelve. The pleadings, issues and trial were framed within the Michigan rules of common law as expounded in Section 339 of the Restatement of Torts which reads:

> "A possessor of land is subject to liability for bodily harm to young children trespasssing thereon caused by a structure or other artificial condition which he maintains upon the land, if
>
> a. the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
>
> b. the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily hard to such children, and
>
> c. the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
>
> d. the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

The defendant permitted to exist, without warning signs, an extremely deceptive and treacherous condition on the surface of the ice surrounding its overflow pipe, knowing that trespassers, and the plaintiffs-decedents, were upon

its property, whereby the plaintiff's decedents became entrapped on deceptive ice, and were drowned.

The cases were combined for trial. A jury returned a verdict for $125,000.00 for David's death and the trial judge awarded $40,989.65 for James's death.

Procedural Facts

Defendant's motion for new trial was denied. The defendant filed an appeal to the State Supreme Court setting forth its grounds and reasons for appeal.

The defendant's attorney, in filing his brief on appeal, added a new section beyond his reasons and grounds for appeal, wherein he asked that P. A. 1953 No. 201 (CLS 1956 §300.201 [Stat. Ann. 1958 Rev. §13.1485]) be considered by the State Supreme Court in connection therewith.

Said statutes reads:

> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

The defendant's attorney admits, with candor his lack of diligence in failing earlier to find and invoke said statute. Only a cursory treatment and briefing was given to this improperly raised statute.

The case was orally argued and duly submitted to the State Supreme Court on January 9, 1964. On May 10, 1965 the State Supreme Court rendered its divided opinion.

The applicability of the above quoted statute, P. A. 1953 No. 201, caused a multi-split decision, of eight judges.

Two Judges stated:

> "There is no claim in this case that the defendant was guilty of gross negligence or wilful and wanton misconduct. There is no testimony that even infers that permission was given to the boys, or that a valuable consideration was paid by them for the privilege of going on defendants' premises • • • The total lack of proof to meet any of these requirements makes this statute applicable"

and then ordered the case reversed and the lower court to enter judgments of no cause of action.

Three judges stated:

> "Fairly read, it seems to me that whole thrust of the declarations is that the boys entered upon the property of the defendant to trap, that defendant had knowledge that many people did so and that defendant was ordinarily negligent in the maintenance of the premises."

They then held that the statute was jurisdictional and ordered the cases reversed and instructed the lower court to enter an order dismissing the declaration for failure to state a cause of action.

Three other judges wrote "The declarations do not disclose the applicability of P. A. 1953, No. 201, to bar plaintiffs asserted cause of action". Then citing various paragraphs of the plaintiffs' declaration wrote, "Standing alone, such allegations are not sufficient, as it is claimed, to invoke the statutory bar of P. A. No. 201, on the conclusionary assumption that the boys were 'on the lands of another • • • for the purpose of fishing, hunting or trap-

ping'. Nor of course did the defendant plead any fact from which either the trial court or we properly could conclude that the boys' purpose in going upon the defendant's land was one of the purposes named in the statute which would bar the causes of action sought to be asserted. Finally the record below fails to disclose any direct evidence that the boys in fact went upon the defendant's land to hunt, fish or trap."

These three judges voted to affirm the judgment of $125,000.00 for David Heider's death, but remanded the James Heider case to the lower court, for a reappraisal of damages as requested by the plaintiff's cross-appeal and further stated: "In the case of James D. Heider, upon remand, the trial court will determine any questions of fact which may be raised and especially the question as to whether he 'went on the lands of another * * * for the purpose of fishing, hunting or trapping.' The court will also consider and determine any issues with regard to the legality and construction of the act which may be raised, such as whether a minor is a 'person' within the meaning of the statute, the word 'person' being undefined and subject to construction in the light of strong public policy favoring the protection of minors; whether the classification of the statute violates due process clauses of the United States and Michigan Constitutions and the equal protection clause of the United States Constitution."

As to the validity of the defendant raising the statute in his brief on appeal, these same three judges stated "Counsel for defendant stress *Morris v. Radley*, 306 Mich. 689 in support of the exception to the rule and argue that we should apply the exception here to avoid a miscarriage of justice because of the inadvertence of counsel in overlooking and failing to raise the application of the statute before the trial court. This is not a proper case to apply the

exception, only when the matter was presented to the trial judge and he refused to rule, or, under the clearest of circumstances, where it is unquestioned that the entire matter is before this court, should the exception prevail.

Such is not the case in which the question is first presented here as an afterthought and accorded cursory treatment and briefing. For these reasons it is not applicable at this late juncture in the case of David Heider. Litigation must come to an end. Defendant has had its day in court with ample opportunity to raise and present all defenses. It is not the function of this Court to correct, on review, the inadvertence or failure of counsel to present what might have been a defense."

On May 28, 1965 an application for rehearing was timely and duly filed. On October 4, 1965, the application for rehearing was denied without opinion, but with two dissents.

In the application for rehearing, the plaintiff first claimed violation of his United States Constitutional rights to due process and equal protection of the law, both as to the State Supreme Court's opinion being in violation of the plaintiff's rights and as to the statute P.A. 1953 No. 201 being unconstitutional as applied to children.

ARGUMENT

I.

As to Violation of Due Process

This case merits consideration since the opinion of the State Supreme Court in and of itself deprives the plaintiff of his day in court. And is a denial of rights given by the 14th Amendment.

In *Saunders v. Shaw,* 244 U.S. 317 (1917), this court in a unanimous decision, speaking through Justice Oliver Wen-

dell Holmes, held that it was a violation of due process for a State Supreme Court to reverse a case and render judgment absolutely against the party who succeeded in the trial court, upon a proposition of fact which was ruled to be immaterial at the trial and concerning which he had, therefore, no occasion and no proper opportunity to introduce his evidence.

Eight judges wrote three different opinions. All discuss the effect of a state statute raised by the defendant not timely, but at the very last step in appellate procedure, and only in his brief on appeal, adding it last and frankly admitting the defendant did not claim the benefits of the statute in the lower court, or in his reasons or grounds for appeal, since through negligence and oversight, it escaped the defendants attorney's attention.

The plaintiff tried and the defendant defended these cases under the theory of ordinary negligence of a land owner. The statute, P. A. 1953 No. 201 reads "Sec. 1. No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting, or trapping, with or without permission, against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

Two Justices, speaking through Justice Kelly, made no mention of the application of the statute to the declarations, but held that the evidence as set forth in the record by the plaintiff, failed to prove by a preponderance of the evidence or the great weight of the evidence such facts as to exclude the operation of the statute, stating that, "the total lack of proof to meet any of these requirements (per-

missive use, payment of a valuable consideration, etc.) makes this statute applicable," and ordered entry of a judgment of no cause of action.

This opinion permitted the defendant to raise at the eleventh hour a statute, post trial, and bind the plaintiff to the facts established without giving the plaintiff his day in court to establish the facts in relation to this statute.

This reasoning destroys the plaintiff's case without giving the plaintiff any chance to produce facts in contravention of the statute. One simple fact, which the plaintiff offered to prove in his petition for rehearing, was that David Heider, age 8 was physically incapable of setting a trap and was not in fact trapping. Proof of this would clearly remove his case from the statute.

Three justices speaking through Justice O'Hara held that the statute as raised was jurisdictional, and that the plaintiff was bound by his pleadings which failed to set forth a cause of action, contravening the statute. This opinion is absolutely silent as to facts produced and their effect upon the statute.

Even though the statute of limitations has run because of this time consuming, lengthy litigation, no opportunity was afforded the plaintiff to amend his pleadings in relation to the statute or in relation to the facts.

If the defendant had properly and initially pleaded the statute, now belatedly raised, the plaintiff, by Michigan court rule and procedure would have had an opportunity to amend his declaration and to produce facts to show that David Heider was not in fact hunting, fishing, or trapping and that even if James Heider was trapping on the defendant's land, (which the record nor pleadings does not affirmatively disclose) the statute was (1) unconstitutional as

applying to them (2) that this statute didn't apply to either minor, (3) that in fact, a valuable consideration existed and (4) that the defendant was guilty of gross negligence.

This opinion destroys not only the plaintiff's justly won verdicts, but denies the plaintiff any opportunity or chance to use the courts to establish his cause of action or have his day in court.

By permitting the defendant to invoke a statute for the first time after a trial, and after the reasons and grounds for appeal are perfected, the defendant is permitted to gain the advantages of a complete surprise as a bar to the plaintiff's claim, an advantage which the defendant could not have gained by proper pleadings and possibly may not have gained upon a trial under the statute.

Further the defendant is permitted to benefit, ex post facto, and entirely outside of orderly proceedings, from a statute which completely altered his theory of defense and permitted him to apply the pleadings and facts to the statute, when in fact the statute required determination of fact issues for its application, while at the same time barring the plaintiff from amending his pleadings or producing any facts in contravention of the statute and by compelling the plaintiff to live with a record tried without any reference to the statute.

These opinions forcibly demonstrate the disaster and havoc that can be wrought by acceptance, by a State Supreme Court at the 11th hour of a statute requiring factual issues for its application, thereby destroying the plaintiff's rights to impartial justice, i.e., the use of the courts to litigate his claim for wrongful death.

This writer maintains that the opinions of the State Supreme Court Justices in and of themselves destroy the

plaintiff's United States Constitutional Rights of due process. Further, to permit the invoking of a fact issue statute at the last possible moment is a violation of the plaintiff's United States Constitutional right to procedural due process, as it awards the defendant relief, for his own lack of diligence, to which he is not justly, fairly or legally entitled to.

As the remaining three Michigan Justices said, speaking through Justice Adams, "Litigation must come to an end. Defendant has had its day in court with ample opportunity to raise and present all defenses. It is not the function of this Court to correct, on review, the inadvertence or failure of counsel to present what might have been a defense."

Further these Justices said "Counsel for defendant stress *Morris v. Radley*, 306 Mich 689, in support of the exception to the rule and argue that we should apply the exception here to avoid a miscarriage of justice because of the inadvertence of counsel in overlooking and failing to raise the application of the statute before the trial court. This is not a proper case to apply the exception. Only when the matter was presented to the trial judge and he refused to rule, or, under the clearest of circumstances, where it is unquestioned that the entire matter is before this Court, should the exception prevail.

Such is not this case in which the question is first presented here as an afterthought and accorded cursory treatment and briefing. For these reasons it is not applicable at this late juncture in the case of David Heider."

These same Justices, because of questionable assessment of damages, voted to remand James Heider's case and stated, "In the case of James D. Heider, upon remand the trial court will determine any questions of fact which may be raised and especially the question as to whether he went

on 'the lands of another * * * for the purpose of fishing, hunting or trapping.' The court will also consider and determine any issues with regard to the legality and construction of the act which may be raised, such as whether a minor is a 'person' within the meaning of the statute, the word 'person' being undefined and subject to construction in the light of a strong public policy favoring the protection of minors; whether the classification of the statute violates the due process clauses of the United States and Michigan Constitutions and the equal protection clause of the United States Constitution."

These three Justices further stated: "The declarations do not disclose the applicability of PA 1953, No. 201, to bar plaintiff's asserted causes of action. Paragraphs 4, 5, and 6 of each declaration allege that the defendant knew that people went upon defendant's lands to hunt, trap, fish, and for other purposes; paragraph 27 of each declaration alleges that the two deceased boys and their dog, "set out muskrat trapping"; and paragraphs 28 of each declaration alleges that the boys and their dog entered the defendant's premises and walked upon one of the defendant's chemical ponds. Standing alone, such allegations ar not sufficient, as it is claimed, to invoke the statutory bar of PA 1953 No. 201, on the conclusionary assumption that the boys were 'on the lands of another * * * for the purposes of fishing, hunting or trapping." Nor, of course, did the defendant plead any facts from which either the trial court or we properly could conclude that the boys' purpose in going upon defendant's land was one of the purposes named in the statute which would bar the causes of action sought to be asserted. Finally, the record as made below fails to disclose any direct evidence that the boys in fact went upon the defendant's lands to fish, hunt, or trap."

It is further stated in this opinion that even the declarations and the trial facts show that the plaintiff is outside of the statute.

It certainly seems barbaric justice and a complete deprivation of the plaintiff's United States Constitutional right to due process and right to produce evidence, and to have his day in court destroyed by the methods invoked by the State Supreme Court and a denial of further procedural due process to permit the invoking of a fact issue statute completely out of all procedural order, merely because of the defendant's neglect in finding and timely invoking it.

Certainly the last thing the plaintiff expected from his own State Supreme Court was the decision, with its various opinions, invoking an improperly raised statute and then applying it in such complete disregard to the plaintiff's fundamental United States Constitutional rights under the 14th amendment.

As Justice Oliver Wendell Holmes said, in *Saunders, supra* "He now brings this writ of error and says that he has been deprived of due process of law contrary to the 14th Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The Chief Justice and Mr. Justice O'Neill were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principle

of the Myles Salt Company's Case that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278."

II.

As to Violation of Equal Protection of Laws

The provisions of P. A. 1953 No. 201 are unreasonable and arbitrary class legislation as factually applied to plaintiff's minor decedents, age 8 and 12 in these cases, and as to all minors.

By the common law of the State of Michigan, trespassing children have a cause of action against an occupier of land for ordinary negligence who maintains a dangerous condition upon his land if he knows or should know they trespass thereon.

In Michigan the children engaged in the following activities on the land of another obtained recovered for ordinary negligence,

Lyshak v. City of Detroit, 351 Mich. 230, (playing on a golf course);
Neilsen v. Stevens, 359 Mich. 130 (bicycle riding);
Carlisi v. City of Maryville, 373 Mich. 477 (swimming);
Huggett v. Erb, 182 Mich. 524 (injured by R.R.);
Powers v. Harlow, 53 Mich. 507 (8 yr. old playing with dynamite);
Jaworki v. Detroit Edison Co., 210 Mich. 317 (8 yr. old killed by phone pole used as teeter);
Peklenk v. Isle Royal Copper Co., 170 Mich. 299 and 187 Mich. 644 (12 yr. old drowned in pit);
Parsons v. Powder Co., 198 Mich. 409 (7 yr. old drowned on ice covered Saginaw River by deceptive conditions).

These are but a few of the many cases allowing recovery for children while engaged in child like activities.

Is the purpose for which a child goes on the land a reasonable or arbitrary classification where the state statute is so restrictive as to prohibit recovery for ordinary negligence to a child who only hunts, fishes, or traps, but permits recovery to a child who goes on the land for any other purpose? Why should a child who swims and drowns recover while a child using the same water for fishing and drowns be prohibited from recovery?

Why should a child who sets a trap, and then crosses the ice and drowns because of deceptive condition, be denied recovery while a child skating at the same location and drowns can recover?

Is the classification reasonable where two children meet tragic deaths under the same circumstances, and the one child can recover for ordinary negligence, but the other child must prove gross negligence or wilful and wanton

misconduct to recover, and thereby having a greater burden of proof? Clearly there is no reasonable classification as applied to children which should require different standards of proofs for injuries or death.

Moreover, the statute is clearly unreasonable and arbitrary as applied to David, age 8 and James age 12, where it requires the minors, as a condition to recovery for ordinary negligence, to pay a valuable consideration. Minors cannot make a valid contract in relation to negligence.

In *Brown v. Wood,* 293 Mich. 148, the Michigan Guest Passenger Act (Comp. Laws 1929 §4648; Stat. Ann. 9.2101) provided that no guest could recover against a driver except for gross negligence or wilful and wanton misconduct without payment for such transportation, and only then could the guest recover for ordinary negligence. A minor driver received money from a minor guest, who sued for ordinary negligence. The defendant, the minor driver, disaffirmed any contract for hire, and the State Court held that the minor guest could not recover for ordinary negligence.

It seems absolutely absurd and completely unreasonable and abritrary to require a minor to be bound by a statute altering the degree of care due him and lessening the land owner's liability upon the payment of a few pieces of silver or other consideration which contract is legally voidable and non-enforceable.

The basic error in this case is that neither the plaintiff's attorney nor the defendant's attorney, nor the trial judge was cognizant of P. A. 1953, No. 201 and yet, belatedly, two children, ages 8 and 12 are held to full knowledge of the statute and with failure to pay consideration thereunder.

The legislation as applied to the instant minors not only compels the attempted enforcement of a voidable contract to recover for ordinary negligence, but carves out of the general class of children an infinitesimal small segment of children and treats them radically different for injury or death under like circumstances.

The legislature forgot, and so did the State Supreme Court, that children engage in all types of outdoor recreational and non recreational activities in going on the lands of another. Why should all children be protected except for the few 8 year olds that hunt, fish or trap or the few 12 year old that hunt, fish or trap.

P. A. 1953 No. 201 is unconstitutional as applied in this case to David, age 8 and James, age 12, as an unreasonable and arbitrary classification and discrimination and as a clear denial of equal protection of the law and due process of the law secured to every child under the 14th Amendment of the United States Constitution.

CONCLUSION

For the foregoing reasons, the plaintiffs respectfully pray that a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

APPENDIX A

OPINION OF THE CIRCUIT COURT

(Filed May 10, 1962)

(Consolidated cases)

This Court has before it for decision at this time two distinctly different but connected cases, both of which involve a number of novel legal questions. Undoubtedly it might be more discreet for this Court to withhold its decision one one of these cases until the Michigan Supreme Court has indicated its opinion on the companion case. Since it appears inevitable, however, that both eventually will reach the Michigan Supreme Court, this Court conceives it to be in the best interests of justice to state its rulings as quickly and succinctly as possible on all of the various questions involved in order to expedite progress of this whole litigation toward appeal and the ultimate conclusion.

In doing so, this Court frankly acknowledges the extraordinary effort and ability which has gone into the preparation of the oral arguments and the voluminous briefs submitted over a period of time by counsel along with the lengthy transcript of the trial proceedings, all of which are available now. As this Court proceeds to examine in detail each of the reasons defense counsel asserted in support of the motion for a judgment notwithstanding the verdict, and in the alternative for a new trial in the case of David Heider, this Court was impressed again by the exceptional skill with which the able and experienced counsel on both sides presented their respective contentions throughout the entire proceedings. Consequently, this Court believes the record indicates that while all possible legal questions were raised and properly preserved for appeal great care was taken to make certain that the case was tried correctly and submitted fairly to the jury.

The jury instructions which defense counsel requested were given in so far as they accurately and appropriately set forth defendant's theory of the case. As plaintiff's counsel has specifically pointed out in his briefs, defendant's requests were refused only when they appeared to be improper because they assumed as facts matters actually in dispute, were argumentative, repetitious, overemphasized defendant's evidence, or were legally incorrect under the circumstances. Thus defendant's requested instruction that the ponds were constructed in accordance with government requirements for correction of water pollution would not be controlling on the question of whether or not they were negligently maintained with respect to trespassing children. The instructions claimed to be error, such as those on the presumption of decedents' freedom from contributory negligence, and deceaseds being trespassers as a matter of law, even if inaccurate, were probably more favorable than defendant deserved, since it appears that there was no evidence of any acts to support defendant's affirmative defense of contributory negligence or to rebut the presumption of deceaseds' due care. (Peklenk v. Isle Royal Copper Co., 187 Mich. 645). Furthermore, some of plaintiff's evidence might well have been interpreted to indicate that deceased's were licensees in trapping muskrat pests on defendant's property. In addition, defendant does not seem to have demonstrated that any material error occurred in the admission or rejection of evidence during the course of the trial. As a result of the errors which are claimed to have occurred actually appear upon re-examination at this time to be comparatively inconsequential, both with respect to their technical legal significance and their actual effect upon the trial. In other words; without elaborating further upon the reasons which opposing counsel have so fully developed in their various briefs, this Court will state that it has carefully reconsidered all of the rulings made upon the evidence and the instructions during the course of the trial and for the reasons detailed by plaintiff's counsel in his briefs, is of the opinion that they were substantially correct under all

the circumstances, and constituted no error as a matter of law. In any event, there appears to be no particular circumstances covered in defendant's motions which could be considered to have altered or affected the judgment as a matter of fact or should have overcome the statute which provides that:

> "No judgment or verdict shall be set aside or reversed, or a new trial be granted by any court in any civil case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the Court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MSA 27.1618.

The principal defense asserted in these two cases, both to the jury as a matter of fact, and also, to the Court as a matter of law, on motions for a directed verdict, and for a judgment notwithstanding the verdict, was that the defendant Michigan Sugar Company was not guilty of any negligence in the operation of its business or the maintenance of its premises and that the unfortunate deaths on defendant's property resulted from an unavoidable accident or the contributory negligence of the parties themselves or their legal guardians.

The facts in the two cases were comparatively clear and uncontroverted. On the afternoon of December 21, 1958, 12 year old James Heider and his 8 year old half brother, David Heider, received permission from their family to take their bicycle and their cocker spaniel to set out muskrat traps in the vicinity of their homes at Sebewaing, Michigan. When they did not return at the expected time, their grandparents went out to look for them but without success. Later a search party discovered the bodies of the boys and their dog at the bottom of a pond on defendant's premises. This pond was a considerable distance inside defendants' property and was used to store water

from defendant's sugar manufacturing plant until some time in the spring, when the State permitted it to be released into the Saginaw Bay. Although none of defendant's employees was shown to have specific knowledge that children trespassed upon defendant's premises to trap, they knew that trespassers came upon defendant's land during the hunting and trapping seasons and that traps were set at the ponds to catch muskrats which frequented them and actually did considerable damage to company property by digging holes in defendant's dikes. Defendant company put up "no trespassing" signs at least twice a year but knew they did not remain in place and often were ignored.

On December 21, 1958, there was no sign in the vicinity of the pond which was largely frozen over in the 12 degree below zero temperature. A pipe was discharging into the pond water which apparently melted the nearby ice. It also formed a frothy foamlike substance which blew and billowed up a foot or more above the water and the surrounding ice and became covered with snow. There were no eye witnesses to the tragedy but the physical facts indicated that after walking across the ice on the pond, the two boys and their dog all plunged through holes in the vicinity of the water pipe and were drowned.

Defendant company certainly was carrying on a legitimate business enterprise on its own premises. It was quite clear from all the evidence in the case, however, that an extremely deceptive and treacherous condition existed in the surface of the ice around the pipe discharging water into the pond. Defendant easily could have employed some sort of a warning device and sign to serve as a notice or caution to trappers and trespassers who were known to use that area frequently. That would not have limited or interfered in any way with defendant's profitable conduct of its business.

On the basis of a careful consideration of all the evidence and the now well established law of this State, this Court concludes that neither the two boys nor their guardians

were guilty of contributory negligence in this case and that the sole, proximate cause of their deaths in this tragic accident was the negligence of the defendant company in the maintenance of its premises contrary to the following legal principle:

> "A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety." (Lyshak v. City of Detroit, 351 Mich. 230; Neilsen v. Henry H. Stevens, Inc., 358 Mich. 130; 2 Restatement of Torts, Sec. 334, 339).

This Court is inclined to agree with plaintiff's counsel that the crucial, controlling question in this case is as follows:

> "Was the jury's verdict for $125,000 damages for the death of David Heider excessive under all the circumstances?"

It certainly would have been so considered under the Michigan decisions prior to Wycko v. Gnodtke, 361 Mich. 331, as the dissenting opinion in that case so emphatically declares. The present case of David Heider, however, was tried in the light of the then very recent ruling law which is proclaimed by the majority of the Michigan Supreme Court in the Wycko Case, supra. In other words, the trial court unequivocally accepted the statement in the majority opinion in the Wycko Case, supra, at p. 338, that, "We now reject * * * the child labor measure of the pecuniary loss suffered through the death of a minor child, namely, their probable wages less the cost of their keep, and all cases consistent therewith we now overrule."

The case was submitted to the jury, as nearly as possible in accordance with the new rule that, "The pecuniary value of a human life is a compound of many elements,

including mutual society and protection and companionship." What these are worth in terms of dollars was not indicated by the Michigan Supreme Court, which instead expressly stated:

> "It is true, of course, that there will be uncertainties in all of these proofs, due to the nature of the case, but we are constrained to observe that it is not the privilege of him whose wrongful act caused the loss to hide behind the uncertainties inherent in the very situation his wrong has created." p. 340, supra.

Both counsel here have offered in their arguments and briefs since the trial, widely different and extremely interesting examples of the increased income David's family might expect to obtain from investing in various ways the amount of money involved in this verdict. As this Court understands the majority opinion in the Wycko Case, however, the pecuniary loss resulting to a family from the death of a child is not measured solely by the extent to which the family's material standard of living is raised or lowered, by his being wrongfully removed from it forever, but by the value which can reasonably be attributed to the loss of mutual society and companionship suffered by the surviving members of the child's family.

It would seem to this Court that the pecuniary value of "mutual society, protection and companionship" would vary vastly with the precise circumstances of the particular individuals involved and might range from a very nominal to a most substantial amount, depending upon the jury's estimate of their importance to the parties. As a matter of fact and law, this is exactly what the courts of other States seem to have held when presented with this problem, which of course has not yet been judicially reviewed in this jurisdiction. Without attempting to emulate the eloquence of higher courts, who have substantiated comparable awards in child death cases, this Court selects from among the many cases cited by plainitff's counsel, Sandifer Oil Company v. Dew, 71 So. 2d 725, 1954, where the Mississippi

Supreme Court in affirming a $90,000 verdict for the death of a 12 year old girl uses language which appears applicable here when it states, "We cannot put a value on loss of companionship and society; that is the function of the jury." Thus this Court understands that in Stephens v. US Mobile Homes of Florida, Inc. (25 NACCA Law Journal 400), a Florida court sustained a jury verdict for $150,000 for the death of electrocution of a 2½ year old child. In the present cause, an experienced jury of responsible, intelligent, business men and housewives heard the last jury case during that term of court and after an orderly trial which appeared to be unusually free from passion, prejudice, pressure, emotionalism or material error of any kind, rendered a verdict which it believed to be reasonable and just. This Court is not now inclined to alter it on the basis of the law and the facts before it.

In considering the case of James Heider, probably the most important question for this Court to decide is the amount of damages to be awarded. This Court finds from the evidence at the trial that the deceased James Heider had lived long enough to be able to demonstrate much more clearly than his younger brother David the talents, abilities, character, and accomplishments which gave such distinct and definite promise of a useful life and a good citizen. As a consequence, it would seem to follow irrefutably that his death would occasion the greater loss, not only to the community but also to his whole family, and that therefore the damages should be higher in his than his brother's case. This Court would be inclined to reach such a conclusion as a matter of simple and obvious justice. In the opinion of this Court, however, such a result does not appear to be permissible under the Michigan statute which creates the cause of action (Courtney v. Apple, 345 Mich. 223, headnotes 3 and 6; MSA 27.711). The statute and the Michigan cases construing it seem to have considered almost every contingency except the one which confronts the Court here. In MacDonald v. Quimby, 350 Mich. 21, which contains the most exhaustive analysis of the statute, the mother as well as the wife and children of the deceased,

was permitted to participate in the recovery of damages. Both opinions of the Court apparently concurred in the conclusion that: "The term 'next of kin' as used in the death act means the nearest blood relations who suffer a pecuniary injury and not all those who would take under the statute of distribution." MacDonald v. Quimby, supra, headnote 6.

Inasmuch as the deceased James Heider apparently had no legal obligation to support his grandparents with whom he lived (MSA 16.122 and 16.125) or his half brothers or sisters (Richardson v. Detroit and M. Ry. Co., 176 Mich. 413, head note 6) or his stepmother fith whom he did not live (MSA 27.712; Stahl v. Gdand Rapids and Ind. R.R. Co., 57 Mich. 239, headnote 6), it would appear that whatever their actual loss may have been under the circumstances, these relatives have sustained no pecuniary, legal damages as a result of James Heider's death (MacDonald v. Quimby, supra).

As defense counsel states,

> "It must be conceded that if defendant is found guilty of negligence, the plaintiff administrator could recover funeral expenses, beyond that we think no recovery should be allowed * * * on behalf of the father because (a) he had no right to recover for the cost of rearing the child because he incurred no expense in that regard. Whatever was expended by way of rearing the child was expended by the grandparents as volunteers. He should not be permitted to recover for loss of wages offset by room and board until age 21 because, by his own conduct, he had relinquished that right."

For the reasons already briefly mentioned earlier in this opinion, as well as those so elaborately set forth in the lengthy dissenting opinion of Courtney v. Apple, 345 Mich. 223, pp. 237-260, this Court believes that to award damages only for James Heider's funeral expenses would be un-

reasonable if not actually unconscionable particularly in the light of the changed rule of law established by the Michigan court in the Wycko Case, supra. It seems obvious to this Court that under the rule in the Wycko Case supra, the plaintiff Donald Heider, father of James Heider, is entitled to damages for the costs of raising James Heider, which appear from the evidence submitted in support of plaintiff's bill of particulars to be at least $10,989.65, which is less than the average estimated in 39 Michigan Bar Journal 11 and 54 N.W. Law Review, 254. The fact that deceased's grandfather, instead of deceased's father, furnished most of this should not in the opinion of this Court relieve the wrongdoer of his liability for it, any more than the voluntary contribution of an injured employee's wages or the payment under the contract of hospital or insurance benefits relieves the wrongdoer from the damages inflicted upon the injured victim (Kurti v. Probelske, 324 Mich. 179, headnote 5; Cawood v. Earl Paige Co., 239 Mich. 485).

The other compensable element of damages which plaintiff sustained in the loss of the society and companionship of his oldest son James who had reached an age where he would have had more in common with his father and not only could have been expected to have brought for joy and satisfaction to him in the few remaining years of his life expectancy, than at any other time, should be reasonably evaluated at a minimum of $30,000, in the opinion of this Court. As a consequence, plaintiff is awarded a judgment of $40,989.65 in the case of James Heider against the defendant, with costs to be taxed in one case only.

Probably because of the size of the verdict and the consequent amount of interest which conceivably could accrue thereon, the attorneys have presented a number of authorities to support their respective contentions as to the time when interest should commence. This Court has carefully examined all of the citations and is convinced that in cases of this kind which involve unliquidated damages for personal injuries, as contrasted with actions based upon contract, or the loss of specific personal property, the great

weight of both reason and authority requires that interest be computed from the date of the judgment. Motyka v. Detroit G.H. & M. Ry. Co., 260 Mich. 396, headnote 3 and p. 398.

This rule is expressly recognized and approved in Wilson v. Dohler-Jarvis, 358 Mich. 510, a workmen's compensation case which plaintiff's counsel cites to support his contention that interest should start with the decedent's death but which, on pp. 517-18 actually adopts the following language from 16 NACCA Law Journal, pp. 135-6:

> "Generally in personal injury cases, courts have declined to allow interest before the date of the judgment, whereas in actions ex contractu interest is allowed from the time of the accrual of the cause of action."

Although Larsen v. Home Telephone Company, 164 Mich. 295, headnote 8, seems to approve a different rule, this Court agrees with defense counsel that to adopt it here would be to compound the damages in improperly allowing interest twice inasmuch as the Court in its instructions to the jury followed the practice recommended in Larsen v. Home Telephone, supra, in these words:

> "It may be said that a more accurate computation would be to estimate the damages suffered to the date of the verdict and add to it the present value of prospective damages."

Probably the entire subject requires further clarification by our Supreme Court. Until then, however, it would appear that this Court is obliged to follow the rule laid down in Motyka v. Detroit Ry. Co., supra, headnote 3, which states the law that still seems to be applicable, and to award interest from the date of the entry of the final judgment in both cases.

Eugene Snow Huff,
Circuit Judge.

Saginaw, Michigan,
May 9, 1962.

APPENDIX B

OPINIONS OF THE MICHIGAN SUPREME COURT

6/7 January 1964

Before the Entire Bench.

KELLY, J.

Plaintiff brings these companion cases under the Death by Wrongful Act statute (CL 1948, §691.581 [Stat Ann 1959 Cum Supp §27.711]), claiming that his sons James (12½ years of age) and David (8 years of age) were drowned in a pond on defendant's premises and that their deaths were caused by defendant's negligence.

Plaintiff demanded a jury only in the David Heider case, and defendant's request for jury trial in the James Heider case was denied. The cases were consolidated for trial, one a jury case and the other a nonjury case.

At the conclusion of plaintiff's proofs, defendant moved for a directed verdict "for the reason that the plaintiffs have failed to produce evidence * * * that would tend to establish any responsibility on the defendant for the death of the children." The court took the motion under advisement and reserved decision in accordance with the terms of the Empson Act.

February 15, 1961, the jury returned a verdict in favor of the plaintiff-administrator of the David Heider estate in the sum of $125,000.

February 28, 1961, defendant filed its motions for new trial and for judgment notwithstanding verdict, on the grounds that the verdict was against the clear preponderance of the evidence, contrary to the great weight of the evidence, and clearly excessive.

May 17, 1962, the trial court directed the entry of a judgment in the nonjury case of James Heider in the

amount of $40,989.65, and on the same date denied defendant's February 28, 1961, motions for new trial and judgment notwithstanding verdict in the David Heider case, said motions having been under consideration by the court during the time he was deliberating on the James Heider nonjury case. Defendant then moved for new trial in the nonjury case and this also was denied, the court relying on its opinion denying the motions in the David Heider case.

Question No. 1: *WAS THE VERDICT AND JUDGMENT IN EACH CASE AGAINST THE CLEAR PREPONDERANCE OF THE EVIDENCE AND CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?*

James and David Heider were half-brothers and did not live together. James was raised by and lived with his grandparents since he was 8 days old. His mother and father (plaintiff Donald Heider) were divorced and the father contributed nothing to James' support.

David, the younger, lived with his mother and younger brother and sister 3 blocks from the grandparents' home, in Sebewaing, Michigan.

The father, plaintiff Donald Heider, was in Jackson prison serving a sentence of from 10 to 20 years on an armed robbery conviction at the time of the accident.

Defendant's 200 acre tract of land is located north of the village limits of Sebewaing. In order to conduct its sugar beet processing operation, it was necessary to prevent beet particles and waste containing limestone, calcium carbonate, et cetera, from running into the Saginaw bay. To meet this problem and the requirements of the Water Resources Commission, defendant, in 1944, commenced building a series of auxiliary ponds which finally culminated in 8 ponds, varying in size from 5.9 acres to 27.1 acres. The ponds are separaed by dikes 12 feet high and wide enough to accommodate a motor vehicle for travel. There are no public roads on defendant's premises.

The pond in which the boys drowned was known as pond No. 3, 27.1 acres in size and, at the time of the accident, was around 7 feet deep. Said pond was located approximately in the center of defendant's tract of land.

A pipe approximately 4 feet from the top of the embankment of pond No. 3 emptied water and waste products into the pond. This chemical waste prevented freezing at the outlet and covered the surface of the water with a foamy substance for an area of 10 feet by 8 feet.

Sunday afternoon (December 21, 1958) the 2 boys left the home of their grandparents about 3.30 p.m., in subzero weather, informing the grandparents they were going to trap muskrats. When they failed to return, the grandmother conducted a search, to no avail. The marshal of Sebewaing was notified and the marshal, firemen, and citizens of Sebewaing conducted a search for well over an hour before any one thought of the possibility of the boys going into defendant's property.

A bicycle was found on the C & O Railroad right-o-way 300 feet north of the public roadway and footprints led from this point along the tracks for about half a mile, then across a ditch to an island in the center of pond No. 3 and, after circling about, the steps led to the point where the pipe was emptying into the pond. There was a bunch of frozen foam about 3 feet from where the footprints ended.

The court in a written opinion held that the cause of death was the negligence of defendants in the maintenance of its premises contrary to legal principles, stating:

> "Although none of defendant's employees was shown to have specific knowledge that children trespassed upon defendant's premises to trap, they knew that trespassers came upon defendant's land during the hunting and trapping seasons and that traps were set at the ponds to catch muskrats which frequented them and actually did considerable damage to company property by digging holes in defendant's dikes. De-

fendant company put up 'no trespassing' signs at least twice a year but knew they did not remain in place and often were ignored. * * *

"On the basis of a careful consideration of all the evidence and the now well established law of this State, this court concludes that neither the 2 boys nor their guardians were guilty of contributory negligence in this case and that the sole, proximate cause of their deaths in this tragic accident was the negligence of the defendant company in the maintenance of its premises contrary to the following legal principle:

"'A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.' (Lyshak v. City of Detroit, 351 Mich 230; Neilsen v. Henry H. Stevens, Inc., 359 Mich 130; 2 Restatement of Torts, §§334, 339)."

The trial court's misinterpretation of our Lyshak and Neilsen, decisions, *supra*, requires emphasis that the legal principle enunciated in these opinions was that defendant in each instance was aware of the fact that infant trespassers were subjecting themselves to danger upon defendant's property. To establish this important point beyond question, not only in regard to this opinion but for future reference, the following excerpts from Justice Talbit Smith's opinion in Lyshak are set forth:

"The main thrust of plaintiff's argument on appeal is devoted to the proposition that defendant city knew that children 'were constantly coming onto the golf course during the summer months, just as they had been doing for over a long period of time.' From this knowledge, says plaintiff, there arose 'a duty on the part of defendant city of Detroit to keep a lookout

for such children who might be on the golf course and, in the exercise of ordinary care, to discover their presence and the presence of infant plaintiff in a dangerous situation as presented itself on the day infant plaintiff was injured and exposed to the danger and peril of being struck by a flying golf ball.' * * *

"It is clear that the plaintiff himself was not on the golf course as a matter of right. * * * A powerfully-driven golf ball in flight is a projectile of lethal qualities, as this record amply demonstrates. * * * The difference between a golf course and a rifle range, then, as a playground for children, is a difference of degree only.

"If duty is born of danger, the duty of the city of Detroit, knowing that children frequent a certain area, is clear. * * *

"To what degree does the landowner still wear the feudal mantle of special privilege, exempting him from the ordinary rules of negligence when children (yes, trespassing children) are known to frequent land upon which he is carrying on an enterprise hazardous to them? Can he simply say, 'They are trespassers' and continue as if they were not there? Can a landowner blindly throw the firing lever and explode blasting charges in a vacant lot that, to his knowledge, is used daily as a playground by (trespassing) neighborhood children? * * *

"A distinction has been drawn between the mere condition of the premises (a child falls into a natural pond) and a dangerous situation on the premises caused by the active intervention, the affirmative acts, of the owner (the child is carelessly run down by the owner's horse and buggy). * * *

"We have mentioned, but we have not emphasized, the distinction between an injury arising from a condition of the premises and one arising from affirmative dangerous conduct by the owner. * * * In the interests

> of accuracy, it ssould be pointed out that the case before us does not involve injury from the mere physical condition of the premises, whether natural or artificial, and hence many of the cases cited by the city against recovery (e.g., Hargreaves v. Deacon, 25 Mich 1; Graves v. Dachille, 328 Mich 69) are not precedent for the situation before us. Here we have injury from dangerous activities conducted in a limited area which trespassers in general are known to frequent. * * * Upon these facts, infant plaintiff, even if a trespasser, was a known trespasser."

Justices Dethmers and Edwards wrote concurring opinions in the Lyshak Case. Justice Dethmers emphasized the fact that the defendant's awareness of the infant trespasser was a controlling feature, stating:

> "Here defendants knew of the presence of small children within the range of a flying golf ball before the foursome. Whether, under such circumstances, it was negligence to drive or permit the driving of a ball in the direction of such small children presented, as I think, a question of fact for the jury."

Justice Edwards, while stating that Lyshak overruled cases "where Michigan has barred recovery for injuries involving infant trespass—holding the effect of child trespass to be identical with that of adult trespass," also said: "This case concerns a child of tender years—obviously too young to look out for himself. His presence in a place of potential danger, beside a golf course fairway, was known to agents of defendant who were on the tee at the time the golf ball was driven, which caused the loss of the boy's eye."

In Neilsen v. Henry H. Stevens, Inc., 359 Mich. 130 (relied upon by the trial court), a 7-year old boy was injured when defendant's truck collided with the boy's bicycle while he was riding it in a concrete area owned by defendant. This case had been tried and determined in the

lower court prior to the Lyshak Case. It was sent back for a new trial, but the fact that defendant knew of the child's presence on its property was made clear by Justice Edwards when he stated:

> "In *Lyshak,* as in the instant case, the Court was dealing with a fact situation where plaintiff alleged active negligence on the part of the defendant toward a minor child whose presence on defendant's property in a place of danger was known to defendant."

Lyshak referred to, but did not repudiate, our early 1872 decision in Hargreaves v. Deacon, 25 Mich 1, where we held:

> "Owners of private property are not responsible for injuries caused by leaving a dangerous place thereon—but not immediately adjourning a highway—unguarded, where the person injured was not on the premises by permission, or on business, or other lawful occasion, and had no right to be there."

Likewise, Lyshak referred to our 1950 Graves decision* but, again, did not overrule or repudiate this decision, but merely stated that the facts in Graves "are not precedent for the situation before us." In the Graves Case we considered the question of whether damages should be awarded in an action for the death of a 6½ year old boy by drowning in stagnant water which had accumulated in a sump on defendants' property incident to an excavation operation. After stating (p. 74), "We do not find in the record that to defendants' knowledge any boy had previously gone swimming in this sump, or that anyone had ever called to defendants' attention that such might happen with fatal results," we held that the trial judge had erroneously denied defendants' motion for a directed verdict because of the absence of proof that would justify a jury finding that defendants were *guilty of gross negligence.*

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* *Graves v. Dachille,* 329 Mich 69.

Lyshak overruled cases referring to defendant's responsibility to trespassers *only* where the facts disclose that defendant owner was aware that child trespassers were entering his property and subjecting themselves to danger and possible harm.

Prior to Lyshak, decisions of this Court did not distinguish between a child and an adult trespasser. In Ryan v. Towar, 128 Mich 463, which was referred to with approval in Petrak v. Cooke Contracting Co., 329 Mich 564, it was held: (1) An invitation or a license to cross the premises of another cannot be predicated on the mere fact that no steps have been taken to interfere with such practice; (2) There is no difference between children and adults as to the circumstances that will warrant the inference of an invitation or a license to enter upon another's premises; and (3) The owner of land is not liable to trespassers thereon for injuries sustained by them not due to his wanton or wilful acts.

The trial court in the present case erroneously concluded that while it was not shown that defendant's employees had "knowlege that children trespassed upon defendant's premises to trap," he could apply the principle of Lyshak and Nielsen, *supra,* because "they knew that trespassers came upon defendant's land during the hunting and trapping season."

In the recent case of Slinker v. Wallner (1960), 258 Minn 243 (103 NW2d 377), the Minnesota supreme court upheld a directed verdict for the defendant by the trial court in an action for the wrongful death of a child by drowning, stating (pp. 248, 251):

> "In upholding recovery in these cases we have gone a long way in placing responsibility upon the occupier of premises to safeguard trespassing children. However, there must come a point where liability does not exist as a matter of law unless occupiers of land are to be held liable merely because children might stray

onto their premises. It would seem that reasonable foreseeability is and must be a necessary prerequisite to liability. * * *

"Here, the record is completely devoid of any evidence from which an inference could reasonably be drawn that the owners or occupiers of the premises involved knew or had any reason to know that children could be expected to play on these grounds any more than it is generally known that they might be found anywhere."

"Reasonable foreseeability" as a necessary prerequisite to liability is not established in this record, which is completely devoid of any evidence from which an inference could be drawn that defendant owner knew, or had any reason to know, that infant children would be trapping, playing, or trespassing upon the property.

The record sustains appellant's statement:

"The pond in question was approximately a quarter of a mile from the nearest highway. A more desolate area could not be imagined. It was mid-winter and below zero weather. There was no reason to believe children would be in the vicinity. No employee of the defendant company had ever seen children trespassing on its premises or had specific knowledge that children trespassed thereon, as is conceded by the trial judge."

In the 1951 Petrak decisions, *supra,* we considered whether defendant-owner of road-making equipment was liable for the death of an 11-year old boy who was killed when a 1,500 to 2,000 pound beam fell on him while he and another boy were playing with a barrel of tar. In upholding a directed verdict for defendant, we, after establishing the principle that the attractive nuisance doctrine is conservatively applied in this State, said: "A reasonably prudent person would not anticipate that children in the vicinity would be likely to play with the trailer."

Applying the principles established in Petrak, we can and should conclude that "a reasonably prudent person

would not anticipate" the tragic events that led up to the death of the 2 boys on defendant's premises.

We conclude that under the evidence in this record and under the decisions of this Court, including Lyshak and Neilsen, *supra,* the judgment in each case was against the clear preponderance and contrary to the great weight of the evidence.

Question No. 2: *SHOULD THE PROVISIONS OF PA 1953, NO. 201* (CLS 1956, §300.201 [Stat Ann 1958 Rev §13.1485]) *BE CONSIDERED BY THIS COURT WHEN SAID STATUTE WAS NOT RAISED IN THE PLEADINGS, NOR AT THE TRIAL, IN THE MOTION FOR NEW TRIAL, OR IN REASONS AND GROUNDS FOR APPEALS?*

PA 1953, No. 201, provides:

> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission, against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

Appellant states:

> "Candor compels our admission that this statute escaped the attention of this brief writer until it was noted in the December 8, 1962 publication of the Negligence Law Section Bulletin of the State Bar of Michigan. It is cited nowhere in the Michigan Reports. We think the force of the enactment is to deprive the plaintiff of any cause of action under the proofs in this case. It is not a matter of affirmative defense nor of limitation. Its language is to abolish any such cause of action. It has no limitation. The cause of action no longer exists. It applies to 'any person'. The statute in question expresses the public

policy of the State. It places the law with reference to trespassing hunters, fishermen and trappers, including minors, where it was prior to the more recent adjudications dealing with trespassing children and beginning with *Lyshak v. City of Detroit*, 351 Mich 230."

Appellee objects to consideration of the statute by this Court in this appeal because it was not raised in the pleadings, nor at trial, motion for new trial, or in the reasons and grounds for appeal; that it is an affirmative defense and cannot be raised as part of the general issues.

My answer to Question No. 1 discloses that without the application of this statute, on the record submitted, the verdict and judgment in each case should be set aside, but as this opinion is written before acceptance or rejection by my Associates, I am answering Question No. 2.

The general rule is well established that upon appellate review, parties cannot assume a position inconsistent with or different from that taken at the trial and are restricted to the theory upon which the case was defended in the court below.

This rule has its exceptions, and in Dation v. Ford Motor Co., 314 Mich 152, we held that the general rule that a question may not be raised for the first time on appeal to the Supreme Court is not inflexible and will not be applied when consideration of a claim sought to be raised is necessary to a proper determination of the case.

Especially is this true where an applicable statute has been overlooked. It has been held that the party's failure to call the trial court's attention to a relevant statute does not preclude the appellate court from considering it.*

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* See 4 *CJS, Appeal and Error*, §§241, 242; *Adley Express Co., Inc. v. Town of Darien*, 125 Conn 501 (7 A2d 446); *Bedenbaugh v. Adams* (Fla., 1956), 88 So2d 765; *Yannuzzi v. United States Casualty Co.*, 19 NJ 201 (115 A2d 557); *Huntress v. Huntress' Estate* (7 CCA Ill) 235 F2d 205 (61 ALR 2d 682).

There is no claim in this case that defendant was guilty of gross negligence or wilful and wanton misconduct. There is no testimony that even infers that permission was given to the boys, or that a valuable consideration was paid by them for the privilege of going upon defendant's premises.

The statute states there must be proof of (1) payment of a valuable consideration, or (2) proof of gross negligence or wilful and wanton misconduct before a party who is on the land of another for fishing, hunting or trapping can seek damages for injuries. In the absence of proof sustaining one of these requirements, the statute specifically states "no cause of action shall arise."

The total lack of proof to meet any of these requirements makes this statute applicable and should be considered by this Court as one more reason why the conclusion reached in answer to Question No. 1 should also be the answer to Question No. 2.

The cases are reversed and remanded to the lower court for entry of judgments of no cause of action. Defendant may recover costs.

John R. Dethmers
Concurred with Kelly, J.

6/7 January 1964

Before the Entire Bench:

O'HARA, J.

I am obligated to vote to reverse with instructions to enter an order dismissing the declarations for failure to state a cause of action of which the court had jurisdiction. This is for the reason that the legislature abolished the cause of action here sought to be asserted. Fairly read, it seems to me the whole thrust of the declarations is that the boys entered upon the property of the defendant to trap; that defendant had knowledge that many people

did so and that defendant was ordinarily negligent in the maintenance of the premises.[1] Altering the order of the paragraphs merely for clarity, the pleadings read:

"27. That David Heider is the minor son of the plaintiff, Donald Heider, and on the 21st day of December, 1958 said son with his brother, James Donald Heider *and their dog set out muskrat trapping.*

"28. That David Heider with his brother and dog entered the defendant's premises and walked onto one of the defendant chemical ponds.

"5. That the defendant knew persons came on their land where their artificial storage ponds are located to trap for muskrats, mink, etc.

"21. That the defendant failed to have any warning signs and failed to maintain the property to protect children." (Emphasis this Court's.)

The wording is identical in the companion case.

The statute[2] involved is herewith set out in its entirety:

"AN ACT restricting suits by persons coming upon the property of another for the purpose of hunting, fishing or trapping; and to declare the limited liability of owners of property within this state.

"*The People of the State of Michigan enact:*

"300.201 Prohibiting tort actions against landowners for recovery of damages, unless caused by negligence, etc. of owner, tenant or lessee. [M.S.A. 13.1485]

"Sec. 1. *No cause of action shall arise for injuries to any person who is on the lands* of another without

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[1] In view of the statute, it matters not whether the boys were licensees, invitees or trespassers.

[2] PA 1953, No. 201 (CLS 1961 §300.201; Stat Ann 1958 Rev §13.1485).

paying to such other a valuable consideration for the purpose of *fishing, hunting or trapping, with or without permission,* against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee.

"Approved June 10, 1953." (Emphasis supplied.)

At the time of these unfortunate deaths the Constitution limited the original jurisdiction of our circuit courts to "all matters civil and criminal not excepted in this constitution and not prohibited by law." (Const 1908, Art 7, §10.[3]

No right or rights of action as pleaded here could have accrued, to the personal representatives of either decedent, the declared acts of defendant *not* being "such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof" (CL 1948, §691.581).

With or without raising the question below, the circuit court was possessed of no jurisdiction to hear and determine the merits of plaintiffs' allegations. See the long list of authorities cited in In Re Frazer's Estate, 288 Mich 392, 394 as supporting this settled principle:

> "Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceedings."

The principle quoted was applied in Lehman v. Lehman, 312 Mich at 105 and Bank & Trust Co. v. Wayne Cir. Judge,

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[3] For the corresponding present provision, see Const 1963, Art 6, §13.

321 Mich at 45. It is controlling here; hence my vote as indicated. The situation here is the same as if plaintiff had declared for alienation of affections. Defendant, having failed to raise the jurisdictional question in due time, should not have costs.

Eugene F. Black,

Otis M. Smith

Concurred with O'Hara, J.

6, 7/January 1964

Before the Entire Bench.

ADAMS, J.

I am unable to agree with Justice Kelly that the trial court misinterpreted *Lyshak v. City of Detroit*, 351 Mich 230, or *Nielsen v. Henry H. Stevens, Inc.*, 359 Mich 130. The trial judge found:

> "Defendant company certainly was carrying on a legitimate business enterprise on its own premises. It was quite clear from all the evidence in the case, however that *an extremely deceptive and treacherous condititon existed in the surface of the ice around the pipe discharging water into the pond.* Defendant easily could have employed some sort of a warning device and sign to serve as notice or caution to *trappers and trespassers who were known to use that area frequently.* That would not have limited or interfered in any way with defendant's profitable conduct of its business." (Emphasis added.)

There is ample evidence in the record to support the findings of the court and jury that defendant's property was frequented by trappers, hunters, skaters and other trespassers. Richard Jahr, an employee of Michigan Sugar, testified:

> "Q. Do you conduct activity on these ponds?
> "A. Well, I've trapped them, being within that area I would say for at least 20 years. * * *

"Q. Well, did they give you permission or didn't they?

"A. They actually did not give me permission, he says in his own words, for all of them *they would like to get rid of the muskrats because they do damage on the ponds,* but if I went onto them I was on my own risk.

"Q. Now, have you ever seen any evidence while you are trapping that other people trapped up there?

* * *

"A. Yes, I seen others out there trap.

"Q. How many people do you know of that trap out there?

"A. Three that I know of." (Emphasis added.)

Max Meissner, also an employee of Michigan Sugar, testified that he had been aware of the fact that people were trapping in the area and that hunters often used the land in question, as many as 30 or 40 during a hunting season.

Floyd Taylor, a truck driver living in Sebewaing, testified it was common knowledge in the community that the Sugar Company premises were a good area for trapping:

"Yes, I think that just about everybody that did any trapping around town knew that that was one of the best areas around, to trap."

He testified that his own boy, when 14 and 15 years old, trapped on the ponds. There was also evidence of the presence of children, small footprints having been seen and the ponds having been used for skating.

The trial judge then went on to apply the proper legal principles. Justice Kelly would now restrict the rule "to trespassers *only* where the facts disclose that defendant owner was aware that child trespassers were entering his property and subjecting themselves to danger and possible harm." The requirement of reasonable care for the safety of a trespasser is subject to no such condition. *Swanson v. City of Marquette,* 357 Mich 424. I am unable to perceive the legal or lethal difference between a "powerfully driven golf ball in flight" (*Lyshak*), "a negligently driven truck".

(*Nielsen*); "an improperly maintained electrical substation or transformer vault" (*Swanson*), and "an extremely deceptive and treacherous condition * * * in the surface of the ice around the pipe discharging water into the pond."

As Justice Talbot Smith observed in *Lyshak*:

> "We accept as commonplace today the principle that there is a duty upon all men so to conduct their activities as to minimize *the likelihood* of harm to others." (Emphasis added.)

Special findings were made by the jury in answer to the following questions:

> "Question No. 1—Was the pond where the boys met their death a place where the Michigan Sugar Company knew, or should have known, that children were likely to trespass? [x] Yes [ ] No
>
> "Question No. 2—Was the place where the boys met their death a place where a condition existed which the Michigan Sugar Company knew, or should have known, involved an unreasonable risk of death to child trespassers? [x] Yes [ ] No
>
> "Question No. 3—Was the utility of maintaining the pond by the Michigan Sugar Company in the condition it was slight as compared to the risk to child trespassers as involved therein? [x] Yes [ ] No"

Likelihood and foreseeability are much the same thing. I do not disagree with Justice Kelly's quotation of the rule in *Slinker v. Wallner*, 258 Minn 243 (103 NW2d 377) (1960), but I do with his interpretation of the facts in these two cases where, in my opinion, likelihood of or foreseeability of possible harm existed before the tragedies occurred.

With regard to the question of damages and whether the awards were excessive or insufficient, it is necessary first of all to determine the persons who would be entitled to share in recovery. In the case of James D. Heider, the

trial court equated the term "pecuniary injury" as used in the wrongful death act (CL 1948, §691.581 *et seq.* [Stat Ann 1959 Cum Supp §27.711 *et seq.*])* with our former requirement that the beneficiary of the statutory action suffering pecuniary injury be one who was entitled to financial support from the deceased, citing *MacDonald v. Quimby,* 350 Mich 21. At the very latest, since our decision in *Wycko v. Gnadtke,* 361 Mich 331, however, we have allowed recovery of damages for pecuniary injury in such actions uotwithstanding the absence of an obligation by the deceased to support the person suffering such pecuniary injury. *MacDonald v. Quimby* is applicable yet to the extent that it was there held, by all members of the Court, that the persons whose "pecuniary injury" is compensable under the death act are those who, in the variant circumstances of intestate succession, might be entitled to inherit the personal property of one dying intestate. In *MacDonald,* the deceased left surviving him a widow and children, but the Court permitted recovery of the pecuniary injuty suffered by deceased's mother notwithstanding the fact that, because deceased left a widow and children surviving him, his mother would not have been entitled to inherit any of his personal estate had he died intestate.

The restriction of the class to Donald Heider, father of James D. Heider, by the trial judge was improper, since, in this case, there were other members of the class who should have been considered. The trial court said:

> "This Court finds from the evidence at the trial that the deceased James Heider had lived long enough to be able to demonstrate much more clearly than his younger brother David the talents, abilities, character, and accomplishments which gave such distinct and definite promise of a useful life and a good citizen. As a consequence, it would seem to follow irrefutably that his death would occasion the greater loss, not only to the community but also to his whole family, and that

* See, currently, CLS 1961, §600.2922 (Stat Ann 1962 Rev §27A.2922).

therefore the damages should be higher in his than in his brother's case. This Court would be inclined to reach such a conclusion as a matter of simple and obvious justice."

Since the court did not make an award to cover pecuniary injury to all of James' next-of-kin, it will be necessary to remand the case for a reconsideration of such award.

Some further comment is appropriate with regard to the assessment of damages which the trial judge did make. He awarded $10,989.65 for the cost of raising James. The sum was incorrectly allocated to Donald Heider, father of James, who did not provide such cost. It should have been allocated to James D. Heider's grandfather, who incurred the cost, and who, being within the statutory class, would be entitled to recover.

The trial judge also awarded $30,000 for loss of the society and companionship of James Heider by his father, Donald Heider, who was 33 years old at the time of the trial. James was the son of his first marriage. His wife deserted the child. Her whereabouts are unknown. Heider contributed nothing to the support of James. He was separated from his second wife. In 1953, he was arrested for nonsupport. In 1957, he pleaded guilty to robbery and was sentenced to the State prison of southern Michigan. He contracted cancer and was discharged from prison July 6, 1959, on special parole. He saw James frequently and went hunting and fishing with him. At the time of trial he had a life expectancy of two to five years. An assessment of $30,000 for the loss of society and companionship by this father upon this record cannot but raise questions. Since the assessment of damages will be redetermined, on remand for further proceedings, we need not determine whether the award made for loss of the child's society and companionship by his father was excessive. Upon retrial the court should consider carefully all elements of pecuniary injury suffered by all members

of the statutory class and he should issue the certificate authorized by the wrongful death act setting forth the amount of such damages and the proportion thereof which represents the pecuniary loss suffered by each of the members of the statutory class.

In the case of 8-year-old David Heider, the jury awarded damages of $125,000. It is asserted that this sum is excessive, against the clear preponderance of the evidence and contrary to its great weight. Appellant states:

> "Mrs. Heider, with the $125,000, at her present age would be able to purchase an annuity which would pay her a guaranteed monthly income of $455.00 for her lifetime."

The loss of companionship in David's case runs not only to the father and mother but also to a younger brother and sister. The amount of damages recoverable in actions for death by wrongful act is one peculiarly within the province of the jury. Taking into account the total family relationship, the probable dependency of the mother upon David, and the loss to the family group of the life of David over a useful lifetime, we do not find the verdict excessive.

With regard to PA 1953, No. 201 (CLS 1961, §300.201 [Stat Ann 1958 Rev §13.1485]), I am unable to agree with either Justice Kelly or Justice Black. [The declarations do not disclose the applicability of PA 1953, No. 201, to bar plaintiff's asserted causes of action. Paragraphs 4, 5, and 6 of each declaration allege that the defendant knew that people went upon defendant's lands to hunt, trap, fish, and for other purposes; paragraph 27 of each declaration alleges that the two deceased boys and their dog "set out muskrat trapping"; and paragraph 28 of each declaration alleges that the boys and their dog entered the defendant's premises and walked upon one of the defendant's chemical ponds. Standing alone, such allegations are not sufficient, as it is claimed, to invoke the statutory bar of PA 1953, No. 201, on the conclusionary assumption that

the boys were "on the lands of another * * * for the purpose of fishing, hunting or trapping." Nor, of course, did the defendant plead any facts from which either the trial court or we properly could conclude that the boys' purpose in going upon defendant's land was one of the purposes named in the statute which would bar the causes of action sought to be asserted. Finally, the record as made below fails to disclose any direct evidence ehat the boys in fact went upon the defendant's lands to fish, hunt, or trap.]

Dation v. Ford Motor Co., 314 Mich 152, is cited by Justice Kelly in support of the proposition that, while usually a question may not be raised for the first time on appeal to the Supreme Court, the rule is not inflexible. In *Dation*, this Court was dealing with an appeal from the workmen's compensation department. A question of law arose upon the appeal which admittedly the department (as a fact finding body) could not settle even if the matter had been remanded to it. The entire question being before this Court, the Court elected to pass upon it.

The problem has not received uniform treatment. Plaintiff cites *Hollister v. Kinyon's Estate*, 195 Mich 261; *Selznick Enterprises v. Garson Productions*, 202 Mich 106; *D & W Rottschafer Real Estate v. Morris*, 245 Mich 192; and *Shaver v. Associated Truck Lines*, 322 Mich 323. Counsel for defendant stress *Morris v. Radley*, 306 Mich 689, in support of the exception to the rule and argue that we should apply the exception here to avoid a miscarriage of justice because of the inadvertence of counsel in overlooking and failing to raise the application of the statute before the trial court. This is not a proper case to apply the exception. Only when the matter was presented to the trial judge and he refused to rule, or, under the clearest of circumstances, where it is unquestioned that the entire matter is before this Court, should the exception prevail.

Such is not this case in which the question is first presented here an afterthought and accorded cursory treatment and briefing. For these reasons it is not applicable

at this late juncture in the case of David Heider. Litigation must come to an end. Defendant has had its day in court with ample opportunity to raise and present all defenses. It is not the function of this Court to correct, on review, the inadvertence or failure of counsel to present what might have been a defense.

In the case of James D. Heider, upon remand the trial court will determine any questions of fact which may be raised and especially the question as to whether he went on "the lands of another * * * for the purpose of fishing, hunting or trapping." The court will also consider and determine any issues with regard to the legality and construction of the act which may be raised, such as whether a minor is a "person" within the meaning of the statute, the word "person" being undefined and subject to construction in the light of a strong public policy favoring the protection of minors; whether the classification of the statute violates the due process clauses of the United States and Michigan Constitutions and the equal protection clause of the United States Constitution.

The judgment in the case of Donald Heider, Administrator for the Estate of James D. Heider, is remanded for consideration of the applicability of PA 1953, No. 201, supra, and for possible reassessment of the damages therein. Costs to neither party, each having prevailed in part.

The judgment in the case of Donald Heider, Administrator for the Estate of David Heider, is affirmed. Costs to appellee.

Theodore Souris

Thomas M. Kavanagh

Concurred with Adams, J.

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IN THE

Supreme Court of the United States

No. ~~869~~ 48 of 1966

HERBERT HEIDER, Administrator for the Estate of
JAMES D. HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent,
and
HERBERT HEIDER, Administrator for the Estate of
DAVID HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

STATEMENT OF FACTS

On December 21, 1958 James D. Heider, a twelve year old boy, and David Heider, his eight year old brother, drowned while on the lands of the Michigan Sugar Company, in an area just north of Sebewaing, Michigan, and near the shore of the Saginaw Bay.

On October 20, 1960, two lawsuits were filed in the Circuit Court for Saginaw County claiming damages under the Michigan Death by Wrongful Act Statute, M.S.A. 27.711. These actions were brought by the same administrator, Donald Heider, the father of the children. The pleadings in each case alleged that the Michigan Sugar Company operated a sugar beet processing plant on its premises, and that in connection therewith it had maintained artificial ponds for the storage of water used in its sugar manufacturing procedures; that this water was contained in large, open, dangerous, unnatural chemical ponds and that the waste product of the sugar from the plant formed a foam-like substance on the surface of the water which had the appearance of snow or ice. It was stated that the defendant sugar company knew that the ponds froze except around the points where the waste products were dumped into the pond and that the waste products gave the appearance of frozen ice or snow. It was alleged that because it was difficult to distinguish the foamy appearance from the frozen area that a dangerous and deceptive condition was created which would be likely to entrap persons, and especially children, and would be likely to bring about their death unless adequate warning signs and fences were erected.

In the case of David Heider, the declaration also contained this statement:

> "27. That David Heider is the minor son of plaintiff, Donald Heider, and that on the 21st day of December, 1958, said son with his brother, James Donald Heider and their dog set out muskrat trapping."

In the lawsuit brought in the death of James Heider, this allegation was contained in plaintiff's declaration:

"27. That James Heider is the minor son of the plaintiff, Donald Heider, and that on the 21st day of December, 1958, said son with his brother, David and their dog set out muskrat trapping."

Defendant alleged as its defense that the children were on the premises of the defendant as trespassers and were there without the knowledge and consent of the defendant and without any invitation on the part of the defendant.

On the issue thus joined, a pretrial conference was held on May 23, 1960 before the Honorable Eugene Snow Huff, Circuit Judge, at Saginaw, Michigan. The plaintiff's claim was again asserted at this time:

"(2) The Court: Do you want to tell us now what this case is about?

"Mr. Pillon: 'The two boys were brothers, James and David. On December 21, 1958 it was about 12 degrees below zero and they were muskrat hunting, they had some traps with them and they went onto some ponds that are maintained by the defendant. The ponds are places where the defendant dumps its waste or by-products from potatoes, which has got some chemicals in it. * * *.'"

At the pretrial conference the cases were consolidated for trial; one as a jury case and one as a non-jury case. The trial of the causes began on February 9, 1961 and in his opening statement plaintiff's counsel said:

"Now what happened in this particular case, is that David Heider was eight years of age at this time. It was on December 21, 1958. He was with his brother, James, we call him Jimmy, he was eleven years old and they had been for quite a period of time setting traps out near Sebewaing and the various parts of the community.

"Now, on this particular day it was exceedingly cold. It was 12 degrees below zero or approximately thereabouts, and these two boys went out on a Sunday afternoon, about 3:00, to set their traps. They were hunting for, trapping for, I believe it was muskrat, something to sell to make a little money.

"The ponds were frozen solid, but they walked across, at the area they walked across, they walked across like the center island and when they came back, they didn't come back the same identical route they went over but, instead, they walked a different angle back.

"They had their traps with them and they were looking for places to set the traps, what was a logical place, in a boy's mind, to set a trap for catching muskrats, and as they were walking across the pond in a different direction, they lost their life, and the way it came about was that the sugar company had a pipe which drains from the other ponds from the plant, dumping water into this pond, and this water has a chemical compound in it of such a nature that on the top of the water it forms like soap, it looks like, just like I suppose a lady taking a bubble bath. It looks like a lot of soap but in the winter time now, this soap gave the appearance of freezing. The substance, whatever it is, it gets cold and it gets hard, and it covers all of the water."

In the trial, Mrs. Alma Heider, the mother, testified on direct examination:

"Q. Did you know that James, or Jim, was trapping?

A. Yes, I did.

Q. How do you know that?

A. Because I went with him.

Q. Did you always go with him?

A. Not always. I went with him when he started to trap, he wanted to trap and I said, 'Well, where do you trap?' and I said, 'I want to see where you

are going first,' so he took me down and showed me where they trapped.

(256) Q. Now do you recall the 21st of December, 1958, the time that David came over to your house?

A. Yes, he came over after dinner.

Q. He came over after dinner?

A. Yes.

Q. And did he and James start out to trap?

A. They were playing until about 3 o'clock, in the house, they were working on a model plane until about 3 o'clock, and then they or Jim asked whether he could still go out and set a few traps and I said, 'Yes, providing they were back before 5 o'clock.'

Q. And why did you want them back?

A. Because we had a church program in the evening and we had to have an early supper. My son Herbert was leaving back for Detroit and he wanted to have supper at 5 o'clock.

Q. Was Jim in that program at the church?

A. Yes, he was. He belonged to the Sunday schools, sang in the choir on Sunday morning.

Q. Now, what happened after you told him to come back at 5 o'clock?

A. Well, they didn't come back when it was 5 o'clock.

Q. So what did you do?

A. Well, I was kind of provoked because they never did, he never did that when he promised something he always kept his promises, so I got in the car and I said, 'Well, I'm going to go look for them.'

Q. Where did you drive to?

(257) A. I drove out to Bayshore where he had his traps set, I had been out there before on Thursday evening before to lift a trap and I knew just exactly where he was going.

Q. You had been out to Bayshore the Thursday before?

A. Yes, Thursday evening right after around 5 o'clock I went with him to lift his trap.

Q. Where did you go that Thursday evening?

A. Just out the Bayshore Road and stopped at the end of this dike they are all talking about, got out of the car and I didn't go back, he looked at his trap and he had a rat and he got it out and threw it in the car and I didn't even shut off the motor, got in the car and we went back home.

Q. What do you mean, he had a rat?

A. A muskrat, what he was trapping for.

Q. Now, was this, where was this place that the trap was set?

A. That was the very first, the very first one at the end of the road there, the very first dike.

Q. In relation to, I have got you up here, this number four pond, in relation to that pond, was it over the embankment of the pond?

A. Where he had his trap set?

Q. Yes, where did he have it?

A. On the other side of the bank."

During the trial, plaintiff's counsel produced several witnesses who testified that trapping was regularly done on the defendant's premises, and that this fact was well known to the defendant's agents.

These cases were concluded, and verdicts were rendered against the defendant in each of the actions. A motion for a new trial was made in each cause, and the opinion of the trial judge respecting these motions was filed May 10, 1962. This opinion is appended to plaintiff's petition as Appendix A. The trial judge says (page 21):

> "The facts in the two cases were comparatively clear and un ontroverted. On the afternoon of December 21, 1958, 12 year old James Heider and his eight year old brother, David Heider, received permission from their family to take their bicycle and their cocker spaniel to set out muskrat traps in the vicinity of their homes in Sebewaing, Michigan."

The motions for new trial were denied, and appeal was thereafter taken by the defendant to the Supreme Court of the State of Michigan. While the Brief was being prepared, defendant's counsel for the first time became aware of a Michigan statute, at 201 PA 1953; C.L. 1948, Section 300.201, M.S.A. 13.1485. This statute provides:

> "'RESTRICTIONS OF SUITS BY HUNTERS, FISHERMEN OR TRAPPERS. Act 201, 1953, p. 281; eff. Oct. 2.
>
> An Act restricting suits by persons coming upon the property of another for the purpose of hunting, fishing or trapping; and to declare the limited liability of owners of property within this state.
>
> The People of the State of Michigan enact:
>
> 13.1485 Limited liability of property owner or tenant to fishermen, hunters or trappers. Section 1. No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission, against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, a tenant or lessee. (C.L. '48, 300.201)'"

It was submitted by defendant that this statute was controlling of the issues raised on appeal inasmuch as the facts were uncontroverted that the boys were on the defendant's premises to trap muskrats. This fact which was reiterated in plaintiff's brief which opens under the heading "Counter-Statement of Facts:

> "On December 21, 1958, James Heider, age 12, and David Heider, age 8½, and their cocker spaniel drowned while trapping for muskrats and minks on the defendant's property."

The appeal was considered by the Michigan Supreme Court, and the cases were decided on January 7, 1964. The cases were decided by the Michigan Supreme Court, and the court's opinion is reported in 375 Mich. 490; 134 NW 2d 637. Justices Kelly and Dethmers voted for a reversal of the lower court decision and concluded that the evidence was insufficient to support a judgment under the existing Michigan common law, and that the judgment in each case was against the clear preponderance and contrary to the great weight of evidence. These judges then went on to consider this statute and found the statute to be applicable and ruled that the causes should be dismissed.

Justices O'Hara, Black and Smith applied the statute which was raised for the first time on appeal and concluded "With or without raising the question below, the Circuit Court was possessed of no jurisdiction to herein determine the merits of plaintiff's allegations." The three votes of these justices together with the votes of Justices Kelly and Dethmers constituted a majority of the court, and an Order of Dismissal was entered on May 10, 1965. Thereafter an application for rehearing was filed by plaintiff's counsel, and this application was denied on October 4, 1965.

ARGUMENT

Plaintiff's Statement of Questions Presented

I.

ARE THE PLAINTIFF'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW UDER THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED;

1. WHEN THE STATE SUPREME COURT REVERSES A CAUSE AND RENDERS JUDGMENT ABSOLUTE AGAINST THE PLAINTIFF, THE SUCCESSFUL PARTY IN THE TRIAL COURT, UPON A STATUTE AND QUESTION OF FACT THAT WAS NEVER BEFORE THE TRIAL COURT OR NOT PROPERLY BEFORE THE STATE SUPREME COURT AND CONCERNING WHICH THE PLAINTIFF HAD NO OCCASION OR OPPORTUNITY TO OFFER PLEADINGS OR EVIDENCE, OR HAVE A DAY IN COURT?

2. BY A STATE SUPREME COURT CONSIDERING AND RENDERING A DECISION BASED ON A STATUTE RAISED FOR THE FIRST TIME BY BRIEF ON APPEAL?

3. BY A STATE SUPREME COURT DECISION WHICH ALLOWS DEFENDANT TO CHANGE HIS LEGAL POSITION WHILE HOLDING PLAINTIFF TO HIS POSITION AS SET FORTH IN THE PLEADINGS, AND AS TRIED?

Defendant says that plaintiff's constitutional rights to due process of law have not been violated.

The verdicts and judgments of the trial court in these causes were reversed in the Michigan Supreme Court by a vote of 5 to 3. Three of the justices voting for reversal found that a statute raised for the first time on appeal was jurisdictional in nature and dismissed the actions on this basis. Two justices, who concurred in reversal, found that the plaintiffs were not entitled to recovery inasmuch as there was not sufficient testimony to support the verdicts on a common law theory of negligence. These two

concurring justices also considered the statute and, by way of dicta, found the statute to be applicable. The reason for the justices venturing an opinion regarding the statute, and when such an opinion would not have been required, is explained by Justice Black in *Keenan v. County of Midland,* 377 Mich. 57 at page 66:

> "It is high time that the profession be informed as to how and why these occasional aberrations of the Court do occur. When two or more discordant opinions for one case are proposed, a minority and sometimes a majority of our members have no idea, and can get no information, respecting the signature intention of other members of the Court. The Court by long tradition proceeds to play—on opinion day—a sort of showdown poker game. No one knows, as the separate opinions are passed around our conference table for signature, what cause or principle is due to prevail and what cause or principle is due to fail. And when the respective signatures are totted up and the signed opinions are sent in to the clerk, those opinions regularly (*Myers* is an example) leave members of the profession wondering whether they or members of the Court have become lightheaded. As for the result, it stands, inexorable as death and taxes, unless a rehearing is ordered."

It would seem that if plaintiff's rights are to be examined that it should first be considered whether a statute can be raised for the first time at the appellate level if that statute is such as to grant jurisdiction or deprive the court of jurisdiction in any cause. This precise question was considered in *In re Estate of Fraser,* 288 Mich. 293 and in that case, preceding a rather long list of authorities, is this proposition:

> "Courts are bound to take notice of limits of their authority, and a court may, or should, on its own motion, though the question is not raised by the

> pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding."

This decision is approved in *Lehman v. Lehman*, 312 Mich. 102, where it is stated,

> "The question of jurisdiction may be properly presented to and passed upon by a court at any stage of pending proceedings."

This concept was followed in *Teeter v. Teeter*, 332 Mich. 1, and as recently as *Haenlein v. Saginaw Building Trades Council, A.F.L.*, 361 Mich. 263, wherein Justice Smith writes of this problem:

> "Yet the inaction or ineptitude of counsel does not relieve a court of the duty of determining its own jurisdiction. *Jones v. Amsel*, 388 Pa. 47, 51 (130 A2d 119): 'The chancellor himself is not (because of failure of the parties to raise the issue) thereby relieved of the obligation of determining his own jurisdiction.'
>
> "The employment of an analogy may serve to bring the issue before us in sharper focus. We will assume that through some misconception of the law, a bill for divorce is filed in the probate court,* that general appearance is entered by the defendant, who challenges jurisdiction in the answer, that thereafter he writes letters to all parties that he will not participate in the trial, does not do so, and that decree *pro confesso* against him is taken. The decree of the probate court is a complete nullity. Challenge thereto will be heard by any court at any time from any party and will be raised by any court

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* Jurisdiction in divorce cases is granted to the circuit courts by statute and not to the probate courts. (M.S.A. 25.86)

> itself, *sua sponte,* should the circumstances become known to it. No rights can be built on such a decree, any officer attempting execution on the faith thereof is a mere trespasser, and the decree may be directly or collaterally assailed. In short, it is a mere *brutum fulmen,* wastepaper. See *Fox v. Martin,* 287 Mich. 147."

There would seem to be little question that a question of jurisdiction can be raised at any time. The practice in Michigan does not vary significantly from federal practice in this regard. While Michigan has no rule comparable to Rule 12h(2) of the Federal Rules of Civil Procedure, it can be fairly concluded that all courts at all times should consider whether they are operating within the scope of their constitutionally granted authority. *French v. Jeffries,* C.C.A. Ill., 1945, 149 F. 2d 555, cert. denied, 326 U.S. 755, 90 L. Ed. 453, 66 S. Ct. 93; *New York, N.H. & H.R. Co. v. Jenkins,* 350 U.S. 155, 76 S. Ct. 227, 100 L. Ed. 166.

A second question arises if it is determined that a jurisdictional statute can be raised for the first time on appeal, and that question is whether the statute is jurisdictional in nature.

The Michigan Constitution of 1908, now superseded, is applicable to these cases and provides in Article VII, Section 10 that:

> "Circuit courts shall have original jurisdiction in all matters civil and criminal not excepted in this constitution and not prohibited by law * * *."

The statute in question reads:

> "RESTRICTIONS, OF SUITS BY HUNTERS, FISHERMEN OR TRAPPERS.
>
> * * * * *
>
> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission, against the owner, tenant or lessee

> of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

The cause of action is prohibited by law, and, accordingly, outside the jurisdiction of the circuit courts.

The final question to be considered is whether the statute is applicable in these cases. Plaintiff's counsel on page 10 of the Petition states that the Supreme Court's opinion:

> "permitted the defendant to raise at the eleventh hour a statute, post-trial, and bind the plaintiff to facts established while not giving the plaintiff his day in court to establish the facts in relation to the statute."

He says also,

> "* * * No opportunity was afforded the plaintiff to amend his pleadings in relation to the statute or in relation to the facts" and "If the defendant had properly and initially pleaded the statute, now belatedly raised, the plaintiff, by Michigan Court Rule and procedure would have had an opportunity to amend his declaration and to produce facts to show that David Heider was not, in fact, hunting, fishing or trapping, and that even if James Heider was trapping on the defendant's land (which the record nor pleadings does not affirmatively disclose) the statute was (1) unconstitutional as applying to them. * * *"

The efforts of plaintiff's counsel to escape the force of the statute by arguing that he was not afforded an opportunity to prove the status of the youngsters as being other than trappers on defendant's premises comes with poor grace. There is no doubt about the purpose for which the boys were on the premises.

Due process ought not to be construed to permit the plaintiff to deny his own position on fact questions. The plaintiff's version of the facts of this case, as expressed in his pleadings, was that the boys were trapping muskrats, and these facts were similarly stated at pretrial:

> "* * * They were muskrat hunting. They had some traps with them, and they went onto some ponds that are maintained by defendant."

Mr. Pillon's opening statement to the jury at the time of trial is the same regarding the activity of the children on the defendant's land. In addition, the mother testified on the direct examination conducted by Mr. Pillon that the boys left on that bitter cold Sunday in December to go muskrat hunting.

It was never the contention of defendant that the children were muskrat trapping on its premises. This fact was first plead into the lawsuit by plaintiff's counsel, and it persisted and continued throughout the trial of the cause and into the appeal stages, even to the opening of the appellee's brief which reads:

> "On December 21, 1958, James Heider, age 12, and David Heider, age 8½, and their cocker spaniel drowned while trapping for muskrats and minks on defendant's property."

These facts contained in the pleadings, which were uncontroverted, are to be treated as true, and are admissions which have a binding effect upon the party making them. The Michigan Court Rules, in effect at the time the declarations were filed, so state.

Michigan General Rules of pleadings, Rule 17, Section 10, "Any statement of facts set forth in any pleading shall be treated as an admission by the pleader and need not be proved by the opposite party."

Court rule number 23, section 6, which was the court rule in effect prior to rule 17 as quoted above, and which contained the exact language, was interpreted in *Grand Trunk Western Railroad Company v. Lovejoy,* 304 Mich. 35. The court stated:

> "In this jurisdiction under court rules all statements contained in a litigant's pleading insofar as they are admissions against interest rather than self serving are treated as evidence thereof. In such admitted facts or circumstances need not be proven by an opposing litigant."

Court rule 17 was construed in *Cashaw v. Greyhound Lines, Inc.,* 331 Mich. 291, and the court in that case concluded that the plaintiffs are bound by their declarations as set forth in their pleadings.

It is not a denial of due process to bind a party to the facts pleaded by such party even if it should transpire that such facts are sufficient to oust the courts of jurisdiction to hear the lawsuit, and to deny the plaintiff the remedy sought.

Plaintiff's Further Statement of Question Presented

II.

ARE THE PLAINTIFF'S CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF LAW UNDER THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED;

1. BY A MICHIGAN STATUTE RELATING TO THE TRESPASSING INDIVIDUALS WHO HUNT, FISH OR TRAP WHERE THE PLAINTIFFS-DECEDENTS, THOUGH MINORS, ARE CLASSIFIED WITHIN SAID STATUTE AND WHERE SUCH STATUTE IS CONTRARY TO THE COMMON LAW RIGHTS OF ALL MINORS WHO HAVE A CAUSE OF ACTION EVEN THOUGH THEY MAY BE TRESPASSERS?

2. BY A MICHIGAN STATUTE WHICH IMPOSES LIABILITY FOR ORDINARY NEGLIGENCE ONLY IF THE MINORS, AGE EIGHT AND TWELVE, RESPECTIVELY, PAY A VALUABLE CONSIDERATION?

It is asserted by plaintiff's counsel that the trapping statute is unconstitutional as applied to David Heider and James Heider, because it is an unreasonable and arbitrary classification and discrimination against children of that age, and that, accordingly, they are denied equal protection of the law as secured by the 14th Amendment of the Constitution of the United States.

In *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 84 L. Ed. 590, 60 S. Ct. 406, Mr. Justice Reed said:

> "Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

The purpose of the trapping statute should be plain. It seeks to relieve land owners of an evil prevalent in the State of Michigan. Private property is commonly disregarded by "fishermen, hunters and trappers," persons who, in the present mobile state of our entire population, create a problem of substantial proportions to those who own or control areas upon which there are, or people think there are, recreational facilities.

Some consideration must be given the question whether the word "person" includes in its definition an 8 year old child and a 12 year old child. The word "person" in its natural and unrestricted sense refers to individual of either sex, men as well as women, and the term is defined as meaning a man, woman or child. 40 C.J.S. 688, *LaBlue v. Specker,* 358 Mich. 558. If minors are to be held exempt from the provisions of this statute, then the legislation would be robbed of a substantial part of its meaning, and there would be only partial relief granted to the owners of properties whose rights prompted the enactment of the statute.

It is contended by counsel for the plaintiff that the statute was not meant to include children within its definition. A similar statute was construed in *Barcoloni v. Atlantic City and Railroad Company,* 81 Atl. 494. In that case a twenty-one month old child was denied recovery under the provisions of a similar statute. It is there said:

> "This statute is a bar to recovery by any person who walks, stands or plays upon any railroad. It in terms precludes any recovery for damages due to injuries received under the conditions therein mentioned and applies to all persons alike, without distinction as to their age, physical or mental condition."

The *Barcoloni* decision was decided by an intermediate appellate court in New Jersey, and that court's decision was given full weight in *Erie Railroad Company v. Hilt*, 247 U.S. 97, 62 L. Ed. 1003, 338 S. Ct. 435. The Supreme Court, speaking through Justice Holmes, held that even though the court that decided *Barcoloni* was not the highest court in New Jersey, its decision should be afforded great weight unless the Court was convinced that it was wrong in its interpretation. Justice Holmes indicated that he felt the New Jersey Appeals Court in *Barcoloni* had correctly applied the statute and that the term person did include a child even of tender years and that recovery should be denied the plaintiff. The *Hilt* case involved a boy of less than seven years of age who was playing marbles near the railroad company's siding.

Similar conclusions have been reached in *Egan v. Erie Railroad Company* (N.J. 1959) 148 A. 2d 830, and in *Kowaleski v. Pennsylvania Railroad Company*, 103 F. 2d 827, (3rd Cir. 1939), certiorari denied, 308 U.S. 556, 60 S. Ct. 95, 84 L. Ed. 467, where recovery was denied; a twelve year old boy was struck by an engine while walking on the railroad right of way.

This precise question reached the Supreme Court again in 1932 in the decision *Erie Railroad Company v. Duplak*, 286 U.S. 440, 76 L. Ed. 1214, 52 S. Ct. 610. A statute which barred recovery by "any person who walked, stood or played upon a railroad" was applied to all persons alike without distinction as to age or physical or mental condition.

The Supreme Court of Michigan has considered the constitutionality of class legislation, and the view regarding such legislation is expressed in *Burgess v. City of Detroit*, 359 Mich. 269 at page 280:

> "This Court has many times held that legislation is not unconstitutional because it is legislation of a particular kind or character, or because it benefits a particular class, so long as the law operates equally upon those within the particular class. *In re Phillips*,, 305 Mich. 636; *Lake Shore Coach Lines, Inc., v. Secretary of State*, 327 Mich. 146; *People's Appliance, Inc. v. City of Flint*, 358 Mich. 34. • • • The legislative body in its wisdom determines who shall receive benefits. In this instance it chose to exclude plaintiffs. This Court cannot and will not question its reasons unless they appear to be palpably arbitrary or unreasonable. *Ver Hoven Woodward Chevrolet, Inc., v. Dunkirk*, 351 Mich. 190; *Metropolitan Funeral System Association v. Commissioner of Insurance*, 331 Mich. 185."

In *Tribbet v. Village of Marcellus*, 294 Mich. 607, the following statement is contained which was quoted with approval in *In re Phillips, supra:*

> "Courts, however, cannot review legislative discretion and declare a given classification arbitrary simply because they differ with the legislature as to the propriety of the classification and the sufficiency of the reasons upon which it is based; for the law making power is vested in the legislature. It must not be lightly assumed that legislators are less wise or less mindful of the mandates of the Constitution, than judges are. Therefore, it is only in cases where it is manifest upon the face of the statute that a classification therein is based upon no reason, but is purely an arbitrary act, that courts may and must, for that reason declare unconstitutional."

The statute under consideration in the *Phillips* case applied alike to all minors whether they were citizens, subjects to the friendly or enemy governments, and equally to all the aliens who desired to be appointed guardians.

The form was approved. The statute in this case applies to all persons. Certainly there can be no broader class than this, and certainly a statute cannot be more equally applied than one which is applicable to all persons. There is a legally recognizable interest which the state may, and should protect. That is the right of property owners to be free from invasion by hunters, trappers and fishermen. It is submitted that the legislation in question is proper and is applicable to the facts of this case.

Wherefore, Defendant prays that the Petition for Certiorari be denied.

Respectfully submitted,

SMITH, BROOKER, HARVEY & COOK,

By: CARL H. SMITH, SR.,
By: A. T. LIPPERT, JR.,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 48

HERBERT HEIDER, Administrator for the Estate of
JAMES D. HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent,
and
HERBERT HEIDER, Administrator for the Estate of
DAVID HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent.

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Circuit Court for the County of Saginaw, Michigan is printed as appendix A, *infra,* and is unreported.

The Michigan Supreme Court's opinion is printed as appendix B, *infra,* and is reported at 375 Mich. 490, 134 N.W. 2d 637 (1965).

JURISDICTION

The judgment of the Supreme Court of Michigan was dated and entered on May 10, 1965. On May 28, 1965 an application for rehearing was duly submitted and the application for rehearing was denied, dated and entered on October 4, 1965.

The jurisdiction of this Court was timely invoked under Article III, Section 2 of the United States Constitution and under 28 USC 1257.

The Honorable Justices of the Supreme Court of the United States on February 21, 1966 granted the petitioner a writ of certiorari and the case was placed on the summary calendar.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the 14th Amendment to the United States Constitution.

The germane part thereof reads: "• • • nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws".

The State statute involved is Act No. 201 of the Michigan Public Acts of 1953 (CLS 1956, §300.201 [Stat Ann. 1958, 13.1485]) which reads:

> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the

purpose of fishing, hunting or trapping, with or without permission against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

QUESTIONS PRESENTED

I.

Is the petitioner's constitutional right to due process of law under the 14th Amendment to the United States Constitution violated when the State Supreme Court reverses a judgment and renders judgment absolute against the plaintiff-petitioner, the successful party in the trial court, upon a statute and question of fact that was never before the trial court and concerning which the plaintiff had no opportunity to plead or offer evidence?

II.

Are the petitioner's rights to due process of law under the 14th Amendment to the United States Constitution violated when a State Supreme Court renders a decision based upon a statute requiring determination of facts for its application, when the statute was raised for the first time in the respondent's brief on appeal, and which decision in effect gives the respondent two days in court by permitting it to change its theory of defense on appeal while holding the petitioner to his claim as alleged to be set forth in his pleadings and in the trial record?

III.

Does the application of a state statute which, as interpreted by the State Supreme Court, requires minors who are injured or die while on the property of another for the purpose of fishing, hunting or trapping to pay to such owner a valuable consideration therefor, or to prove gross negligence or wilful and wanton misconduct of the owner in order to recover while other minors who are injured or die on the same property but who are not engaged in such activities can recover upon proof of ordinary negligence of the owner without a showing of payment of a valuable consideration deny to the former class of minors the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution?

THE BASIC FACTS

Trial Facts

Four days before Christmas, 1958, two small children, David Heider, age 8, and his half brother, James Heider, age 12, with their dog, a water spaniel, went upon the property of the respondent, Michigan Sugar Co. which maintained acres and acres of artificial open storage ponds. It was 12° below zero. The ponds were frozen solid except around the overflow pipe concealed in vegetation connecting each pond. The movement of liquid out of the overflow pipe, coupled with the chemicals in the water, created a large area of foamy-soapy, snow-like substance that built up over the open water, the soft ice and part of the solid ice.

The respondent maintained this trap-like, deceptive and dangerous condition knowing that trespassers came upon its property, but maintained no danger or warning signs.

The tracks of the two children and their dog led across solid ice and into the accumulated foamy snow-like substance where the children became entrapped and drowned. The older child, David, had a Red Cross merit swimming certificate.

There were no eye witnesses who saw the children on the property at the time nor did anyone witness the drownings.

An Administrator was appointed and suit instituted for their wrongful deaths. Suit was based on Michigan common law providing that trespassing children have a cause of action for ordinary negligence against an occupier of land who maintains a dangerous condition upon his land if he knows or should know that they trespass thereon.

David's case, containing elements of special damages, was tried before a jury, while James' case was tried before the Judge. The jury's verdict was for $125,000.00 and the Judge's verdict was for $40,939.65.

Procedural Facts

Defendant-respondent's motion for new trial was denied. The defendant-respondent filed an appeal to the State Supreme Court setting forth its grounds and reasons for appeal.

The defendant-respondent's attorney, in filing his brief on appeal, added a new section beyond his reasons and grounds for appeal, wherein he asked, completely out of all procedural order, that P. A. 1953 No. 201 (CLS 1956

§300.201 [Stat. Ann. 1958, Rev. §13.1485]) be considered by the State Supreme Court in connection therewith.

Said statute reads:

> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

The defendant-respondent's attorney admits with candor, his lack of diligence in failing earlier to find and invoke said statute in the trial and Supreme Court. Only a cursory treatment and briefing was given to this improperly raised statute.

The case was orally argued and duly submitted to the State Supreme Court on January 9, 1964. On May 10, 1965 the State Supreme Court rendered its divided decision.

The applicability of the above quoted statute, P. A. 1953 No. 201, caused a multi-split decision, of eight judges.

Two Judges stated:

> "There is no claim in this case that the defendant was guilty of gross negligence or wilful and wanton misconduct. There is no testimony that even infers that permission was given to the boys, or that a valuable consideration was paid by them for the privilege of going on defendants' premises • • • The total lack of proof to meet any of these requirements makes this statute applicable"

and then ordered the case reversed and the lower court to enter judgments of no cause of action.

Three Judges stated:

> "* * * Fairly read, it seems to me the whole thrust of the declarations is that the boys entered upon the property of the defendant to trap; that defendant had knowledge that many people did so and that defendant was ordinarily negligent in the maintenance of the premises."

They then held that the statute was jurisdictional and ordered the cases reversed and instructed the lower court to enter an order dismissing the declaration for failure to state a cause of action.

Three other judges wrote "The declarations do not disclose the applicability of P. A. 1953, No. 201, to bar plaintiffs asserted cause of action". Then citing various paragraphs of the plaintiffs' declaration wrote, "Standing alone, such allegations are not sufficient, as it is claimed, to invoke the statutory bar of P. A. No. 201, on the conclusionary assumption that the boys were 'on the lands of another * * * for the purpose of fishing, hunting or trapping'. Nor of course did the defendant plead any fact from which either the trial court or we properly could conclude that the boys' purpose in going upon the defendant's land was one of the purposes named in the statute which would bar the causes of action sought to be asserted. Finally the record below fails to disclose any direct evidence that the boys in fact went upon the defendant's land to hunt, fish or trap."

These three judges voted to affirm the judgment of $125,000.00 for David Heider's death, but remanded the James Heider case to the lower court, for a reappraisal of damages as requested by the plaintiff's cross-appeal and further stated: "In the case of James D. Heider, upon remand, the trial court will determine any questions of fact which

may be raised and especially the question as to whether he 'went on the lands of another * * * for the purpose of fishing, hunting or trapping.' The court will also consider and determine any issues with regard to the legality and construction of the act which may be raised, such as whether a minor is a 'person' within the meaning of the statute, the word 'person' being undefined and subject to construction in the light of strong public policy favoring the protection of minors; whether the classification of the statute violates due process clauses of the United States and Michigan Constitutions and the equal protection clause of the United States Constitution."

As to the validity of the defendant raising the statute in its brief on appeal, these same three judges stated "Counsel for defendant stress *Morris v. Radley,* 306 Mich. 689 in support of the exception to the rule and argue that we should apply the exception here to avoid a miscarriage of justice because of the inadvertence of counsel in overlooking and failing to raise the application of the statute before the trial court. This is not a proper case to apply the exception, only when the matter was presented to the trial judge and he refused to rule, or, under the clearest of circumstances, where it is unquestioned that the entire matter is before this Court, should the exception prevail.

"Such is not the case in which the question is first presented here as an afterthought and accorded cursory treatment and briefing. For these reasons it is not applicable at this late juncture in the case of David Heider. Litigation must come to an end. Defendant has had its day in court with ample opportunity to raise and present all defenses. It is not the function of this Court to correct, on review, the inadvertence or failure of counsel to present what might have been a defense."

On May 28, 1965 an application for rehearing was timely and duly filed. On October 4, 1965, the application for rehearing was denied without opinion, but with two dissents.

In the application for rehearing, the plaintiff first claimed violation of his United States Constitutional rights to due process and equal protection of the law, under the 14th Amendment both as to the State Supreme Court's opinion being in violation of the plaintiff-petitioner's rights and as to the statute P.A. 1953 No. 201 being unconstitutional as applied to children.

ARGUMENT I.

Question

IS THE PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHEN THE STATE SUPREME COURT REVERSES A JUDGMENT AND RENDERS JUDGMENT ABSOLUTE AGAINST THE PLAINTIFF-PETITIONER, THE SUCCESSFUL PARTY IN THE TRIAL COURT, UPON A STATUTE AND QUESTION OF FACT THAT WAS NEVER BEFORE THE TRIAL COURT AND CONCERNING WHICH THE PLAINTIFF HAD NO OPPORTUNITY TO PLEAD OR OFFER EVIDENCE?

Law

Constitutionally each litigant is entitled to his day in court, but the manner in which the Supreme Court of Michigan applied Act No. 201, Michigan Public Acts of 1953, denied to petitioner that right.

The respondent invoked Act No. 201, Michigan Public Acts of 1953, C.L.S. of 1956, §300.201, Stat. Ann. §13.1485,

for the first time in its brief filed in the State Supreme Court. At the time this cause of action arose and at the time of trial, the statute provided:

> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

In applying this statute to this case a State Supreme Court of eight Justices handed down three different opinions.

Two Justices, speaking through Justice Kelly, made no mention of the application of the statute to the pleadings, but held that petitioner's evidence as set forth in the record failed to prove by a preponderance of the evidence such facts as to exclude the operation of the statute, stating that, "the total lack of proof to meet any of these requirements [payment of a valuable consideration, or proof of gross negligence or wilful and wanton misconduct] makes this statute applicable" (327), and ordered entry of a judgment of no cause of action.

This reasoning destroys the petitioner's case without giving him any opportunity to produce evidence taking the case outside the scope of the statute.

Three Justices, speaking through Justice O'Hara, held that the statute raised was jurisdictional, and that the petitioner was bound by his pleadings which failed to set forth a cause of action outside the scope of the statute.

Three Justices, speaking through Justice Adams, in upholding the petitioner's contentions stated:

> "The declarations do not disclose the applicability of P.A. 1953 No. 201 to bar plaintiffs' [petitioner's] asserted causes of action. Paragraphs 4, 5, and 6 of each declaration allege that the defendant knew that people went upon defendant's lands to hunt, trap, fish, and for other purposes; paragraph 27 of each declaration alleges that the two deceased boys and their dog 'set out muskrat trapping'; and paragraph 28 of each declaration alleges that the boys and their dog entered the defendant's premises and walked upon one of the defendant's chemical ponds. Standing alone, such allegations are not sufficient, as it is claimed, to invoke the statutory bar of P. A. 1953, No. 201, on the conclusionary assumption that the boys were 'on the lands of another
>
> * * * for the purpose of fishing, hunting or trapping.' Nor, of course, did the defendant plead any facts from which either the trial court or we could conclude that the boys' purpose in going upon defendant's land was one of the purposes named in the statute which would bar the causes of action sought to be asserted. Finally, the record as made below fails to disclose any direct evidence that the boys in fact went upon the defendant's lands to fish, hunt or trap" (335-336).

If the statute had been properly invoked at the trial level, the petitioner would not have been denied his day in court, for he could have exercised his right to amend pleadings, if necessary. But more than that, the petitioner would have been assured a fair trial. By proofs, he could show as he did by affidavits attached to his petition for rehearing that little David, age 8, was physically incapable of trapping, owned no traps, and had never trapped (342-346); that the testimony established that there were no eye witnesses to the drownings (92); and that, therefore, there existed a question of fact under the statute as to the reason why James, age 12, was upon the

respondent's property at the time he drowned. These are but a few of the facts which petitioner could produce at a trial where he is properly confronted with a defense grounded upon Act 201, Michigan Public Acts of 1953.

As it is, the decision of the State Supreme Court not only strips petitioner of his judgments, but serves to reward respondent for its negligence in failing to invoke the statute timely.

In *Saunders v. Shaw*, 244 U.S. 317, 37 S. Ct. 638, 61 L. Ed. 1163 (1917), this Court in a unanimous decision, speaking through Justice Oliver Wendell Holmes, held that it was a violation of due process for a State Supreme Court to reverse a case and render judgment absolutely against the party who succeeded in the trial court, upon a proposition of fact which was ruled to be immaterial at the trial and concerning which he had, therefore, no occasion and no proper opportunity to introduce his evidence.

As Justice Oliver Wendell Holmes said in *Saunders, supra* (244 U.S. at 319-320):

> "* * * He now brings this writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissibble, in order to rebut the testimony already ruled to be inadmissible, in accordance with his view. The Chief Justice and Mr. Justice O'Neill were of opinion that the cases should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the Supreme Court thought that it was so plain on

the uncontroverted facts that the case was within the principle of *The Myles Salt Company's Case* that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

"* * * But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U. S. 278."

Clearly your petitioner has been denied due process for he has unfairly been deprived of his day in court in relation to P.A. 1953 No. 201.

ARGUMENT II.

Question

ARE THE PETITIONER'S RIGHTS TO DUE PROCESS OF LAW UNDER THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHEN A STATE SUPREME COURT RENDERS A DECISION BASED UPON A STATUTE REQUIRING DETERMINATION OF FACTS FOR ITS APPLICATION, WHEN THE STATUTE WAS RAISED FOR THE FIRST TIME IN THE RESPONDENT'S BRIEF ON APPEAL, AND WHICH DECISION IN EFFECT GIVES THE RESPONDENT TWO DAYS IN COURT BY PERMITTING IT TO CHANGE ITS THEORY OF DEFENSE ON APPEAL WHILE HOLDING THE PETITIONER TO HIS CLAIM AS ALLEGED TO BE SET FORTH IN HIS PLEADINGS AND IN THE TRIAL RECORD?

Law

Litigation must come to an end. The defendant-respondent has had its day in court with ample opportunity to raise and present all defenses. It is not the function of a court on review to correct the inadvertence or failure of counsel to present what might have been a defense. For justice sake, litigation should be promptly and properly tried and decided.

These causes of action arose for the wrongful death of two boys, David Heider, age eight and James Heider, age twelve. The pleadings, issues and trial were framed within the Michigan rules of common law as expounded in Section 339 of the Restatement of Torts which reads:

> "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

a. the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

b. the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

c. the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

d. the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

The respondent permitted to exist, without warning signs, an extremely deceptive and treacherous condition on the surface of the ice surrounding its overflow pipe, knowing that trespassers, such as the petitioner's decedents, came upon its property, and as a result petitioner's decedents became entrapped and were drowned.

The respondent interposed a general denial, and claimed contributory negligence on the part of the boys, their parents, or guardians; lack of knowledge that the minors were upon its premises; and that adequate warning not to use the premises had been given.

Upon the issues thus framed, trial in David Heider's case, which consumed approximately one week, resulted in a jury verdict of $125,000.00, and in James Heider's case, a trial before the judge resulted in a verdict of $40,989.65.

Motions for new trials were filed by respondent but denied by the trial judge. Respondent then took appeal

to the State Supreme Court. All the errors claimed by the respondent, in its motion for new trial and in its grounds for appeal to the State Supreme Court were in effect rejected. Two of the eight Justices of the State Supreme Court ruled in part that the petitioner had failed to prove his case by a preponderance of the evidence. However, the balance of that opinion and the other two opinions fail utterly to support the respondent or overrule the petitioner on any claimed error in the trial proceedings. The respondent failed to bring to the trial court's attention Act No. 201, Michigan Public Acts of 1953, and failed to raise said statute before the State Supreme Court in its grounds for appeal. The respondent, entirely out of order due process-wise, inserted the statute as an afterthought in its brief on appeal, but with candor admitted its lack of diligence in earlier asserting the statute.

The differing opinions rendered by the State Supreme Court forcibly demonstrate the havoc that can be wrought where a statute requiring determination of factual issues for its application is permitted to be raised at the 11th hour and then is acted upon by an appellate court.

Such a situation forces petitioner to live with his pleadings and the trial record in their original form, while relieving the respondent from its pleadings and from the trial record, and permitting it to substitute an entirely different theory of defense.

In *Saunders v. Shaw, supra,* the petitioner was held to have been deprived of his day in court. Certainly no litigant is entitled to the reverse, namely, two days in court. When all the issues which are presented or which could have been presented were fairly and justly tried, the respondent had its day in the trial court. It had the opportunity to

raise each and every available defense. It elected through neglect, to defend only upon certain principles and theories. Constitutionally speaking, it had its day in court.

By being permitted to invoke for the first time after trial has been completed and appeal perfected, a statute which requires determination of factual issues for its application, the respondent gained an awesome advantage which it could not otherwise gain, namely, complete surprise and a victory unconstitutionally achieved.

The petitioner respectfully submits that he was not accorded due process of law when the State Supreme Court rendered a decision based upon a statute which required determination of facts for its application and which was raised for the first time in respondent's brief on appeal, thereby affording respondent two days in court by permitting it to change on appeal its theory of defense while holding petitioner to his claim as set forth in his pleadings and in the trial record.

ARGUMENT III.

Question

DOES THE APPLICATION OF A STATE STATUTE WHICH, AS INTERPRETED BY THE STATE SUPREME COURT, REQUIRES MINORS WHO ARE INJURED OR DIE WHILE ON THE PROPERTY OF ANOTHER FOR THE PURPOSE OF FISHING, HUNTING OR TRAPPING TO PAY TO SUCH OWNER A VALUABLE CONSIDERATION THEREFOR, OR TO PROVE GROSS NEGLIGENCE OR WILFUL AND WANTON MISCONDUCT OF THE OWNER IN ORDER TO RECOVER WHILE OTHER MINORS WHO ARE INJURED OR DIE ON THE SAME PROPERTY BUT WHO ARE NOT ENGAGED IN SUCH ACTIVITIES CAN RECOVER UPON PROOF OF ORDINARY NEGLIGENCE OF THE OWNER WITHOUT A SHOWING OF PAYMENT OF A VALUABLE CONSIDERATION DENY TO THE FORMER CLASS OF MINORS THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

Law

The statute in question, as it provided at the time these causes of action arose, and at the time of trial and as applied by the State Supreme Court, is a drastic change from the common law of Michigan. By the common law, trespassing children have a cause of action for ordinary negligence against an occupier of land who maintains a dangerous condition upon his land if he knows or should know they trespass thereon.

In Michigan the children engaged in the following activities on the land of another obtained recovery for ordinary negligence; *Lyshak v. City of Detroit,* 351 Mich. 230, 88 N.W. 2d 596 (1957) (playing on a golf course); *Nielsen v. Stevens,* 359 Mich. 130, 101 N.W. 2d 284 (1960) (bicycle

riding); *Carlisi v. City of Marysville,* 373 Mich. 198, 128 N.W. 2d 477 (1964) (swimming); *Huggett v. Ebb,* 182 Mich. 524, 148 N.W. 805 (1914) (injured by R.R.); *Powers v. Harlow,* 53 Mich. 507, 19 N.W. 257 (1884) (8 yr. old playing with dynamite); *Jaworski v. Detroit Edison Co.,* 210 Mich. 317, 178 N.W. 71 (1920) (8 yr. old killed by phone pole used as teeter); *Peklenk v. Isle Royale Copper Co.,* 170 Mich. 299, 136 N.W. 352 (1912) and 187 Mich. 644, 153 N.W. 1068 (1915) (12 yr. old drowned in pit); *Parsons v. Powder Co.,* 198 Mich. 409, 164 N.W. 413 (1917) (7 yr. old drowned on ice covered Saginaw River by deceptive conditions).

Is the purpose for which a child goes on the land a reasonable basis for classification where the state statute is so restrictive as to prohibit recovery for ordinary negligence to a child who only hunts, fishes, or traps without paying to the landowner a valuable consideration while allowing recovery for ordinary negligence to a child who goes on the land for any other purpose without paying to the landowner a valuable consideration? It is reasonable that a non-paying child who drowns while swimming is entitled to recover on the basis of ordinary negligence while a non-paying child who drowns while fishing in the same water is prevented from recovering on the basis of ordinary negligence? Is it reasonable to deny recovery for ordinary negligence to a non-paying child who sets a trap and then drowns because of a deceptive condition, and to allow recovery for ordinary negligence to a non-paying child who drowns while ice skating at the same location?

The prohibition of the equal protection clause goes no further than the invidious discrimination, *Morey v. Doud,* 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957), which is clearly worked here by this statute which without rea-

sonable basis places a far greater burden of proof upon children who are injured or die while engaged in fishing, hunting or trapping than that to be borne by children who are injured or die at the very same location while engaged in other activities.

Assume for the sake of argument only that David, age 8, was not trapping, but was merely tagging along with his older brother, James, age 12, who was trapping on respondent's property when they drowned. Under the statute, recovery for David's death could be had on the basis of ordinary negligence of the landowner but recovery for James' death could be had only upon proof of gross negligence or wilful and wanton misconduct, although both children died together as a result of the identical negligence of the landowner.

The petitioner submits that *Oyama v. California,* 332 U.S. 633, 68 S. Ct. 269, 92 L. Ed. 249 (1948), is in point. In *Oyama,* a minor son of an alien not eligible for naturalization was placed by California law under a burden of overcoming a statutory presumption of intent to evade the escheat laws while minor children whose parents were either citizens or eligible aliens were not confronted with such a burden. This Court reversed the judgment of the Supreme Court of California and held that the minor son had been denied the equal protection of the laws, stating (332 U.S. at 644):

> "The cumulative effect, we believe, was clearly to discriminate against Fred Oyama. He was saddled with an onerous burden of proof which need not be borne by California children generally. The statutory presumption and the two ancillary inferences, which would not be used against most children, were given such probative value as to prevail in the face

> of a deed entered in the public records, four court orders recognizing Fred Oyama as the owner of the land, several newspaper notices to the same effect, and testimony that business transactions regarding the land were generally understood to be on his behalf. In short, Fred Oyama lost his gift, irretrievably and without compensation, solely because of the extraordinary obstacles which the State set before him."

The basic error in this case is that neither the plaintiff's attorney nor the defendant's attorney, nor the trial judge was cognizant of the statute in question and yet, belatedly, two children, ages 8 and 12, are held to full knowledge of the statute and with failure to pay consideration thereunder.

The petitioner respectfully submits that the application of this statute, as interpreted by the Supreme Court of Michigan, denies to these minor children the equal protection of the laws.

CONCLUSION

The petitioner prays:

1. If the Court rules that the petitioner has been denied his day in court in relation to the Michigan statute in question, that the judgment of the Supreme Court of Michigan be reversed and the cause remanded for new trial with costs to the petitioner.

2. If this Court rules that the Michigan statute in question was improperly considered or that the respondent had in effect two days in court, that the judgment of the Supreme Court of Michigan be reversed and that the judg-

ment of the trial court entered on May 17, 1962 in the amount of Forty Thousand Nine Hundred Eighty-Nine Dollars and Sixty-Five Cents ($40,989.65) in the case of James Heider be reinstated with statutory interest of 5% per year from the date thereof, that the judgment of the trial court entered on jury verdict on May 17, 1962 in the amount of One Hundred Twenty-Five Thousand Dollars ($125,000.00) in the case of David Heider be reinstated with statutory interest of 5% per year from the date thereof, with costs to the petitioner.

3. If this court rules that the Michigan statute in question is unconstitutional as applied to these children, that the judgment of the Supreme Court of Michigan be reversed and that the judgment of the trial court entered on May 17, 1962 in the amount of Forty Thousand Nine Hundred Eighty-Nine Dollars and Sixty-Five Cents ($40,989.65) be reinstated with statutory interest of 5% per year from the date thereof in the case of James Heider, and that the judgment of the trial court entered on jury verdict on May 17, 1962 in the case of David Heider in the amount of One Hundred Twenty-Five Thousand Dollars ($125,000.00) be reinstated with statutory interest of 5% per year from the date thereof, with costs to the petitioner.

Respectfully submitted,

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Detroit, Michigan 48226,
Attorney for Petitioner.

APPENDIX A

OPINION OF THE CIRCUIT COURT

(Filed May 10, 1962)

(Consolidated cases)

This Court has before it for decision at this time two distinctly different but connected cases, both of which involve a number of novel legal questions. Undoubtedly it might be more discreet for this Court to withhold its decision on one of these cases until the Michigan Supreme Court has indicated its opinion on the companion case. Since it appears inevitable, however, that both eventually will reach the Michigan Supreme Court, this Court conceives it to be in the best interests of justice to state its rulings as quickly and succinctly as possible on all of the various questions involved in order to expedite progress of this whole litigation toward appeal and the ultimate conclusion.

In doing so, this Court frankly acknowledges the extraordinary effort and ability which has gone into the preparation of the oral arguments and the voluminous briefs submitted over a period of time by counsel along with the lengthy transcript of the trial proceedings, all of which are available now. As this Court proceeds to examine in detail each of the reasons defense counsel asserted in support of the motion for a judgment notwithstanding the verdict, and in the alternative for a new trial in the case of David Heider, this Court was impressed again by the exceptional skill with which the able and experienced counsel on both sides presented their respective contentions throughout the entire proceedings. Consequently, this Court believes the record indicates that while all possible legal questions were raised and properly preserved for appeal great care was taken to make certain that the case was tried correctly and submitted fairly to the jury.

The jury instructions which defense counsel requested were given in so far as they accurately and appropriately set forth defendant's theory of the case. As plaintiff's counsel has specifically pointed out in his briefs, defendant's requests were refused only when they appeared to be improper because they assumed as facts matters actually in dispute, were argumentative, repetitious, overemphasized defendant's evidence, or were legally incorrect under the circumstances. Thus defendant's requested instruction that the ponds were constructed in accordance with government requirements for correction of water pollution would not be controlling on the question of whether or not they were negligently maintained with respect to trespassing children. The instructions claimed to be error, such as those on the presumption of decedents' freedom from contributory negligence, and deceaseds being trespassers as a matter of law, even if inaccurate, were probably more favorable than defendant deserved, since it appears that there was no evidence of any acts to support defendant's affirmative defense of contributory negligence or to rebut the presumption of deceaseds' due care. (Peklenk v. Isle Royal Copper Co., 187 Mich. 645). Furthermore, some of plaintiff's evidence might well have been interpreted to indicate that deceased's were licensees in trapping muskrat pests on defendant's property. In addition, defendant does not seem to have demonstrated that any material error occurred in the admission or rejection of evidence during the course of the trial. As a result of the errors which are claimed to have occurred actually appear upon re-examination at this time to be comparatively inconsequential, both with respect to their technical legal significance and their actual effect upon the trial. In other words, without elaborating further upon the reasons which opposing counsel have so fully developed in their various briefs, this Court will state that it has carefully reconsidered all of the rulings made upon the evidence and the instructions during the course of the trial and for the reasons detailed by plaintiff's counsel in his briefs, is of the opinion that they were substantially correct under all

the circumstances, and consisted no error as a matter of law. In any event, there appears to be no particular circumstances covered in defendant's motions which could be considered to have altered or affected the judgment as a matter of fact or should have overcome the statute which provides that:

> "No judgment or verdict shall be set aside or reversed, or a new trial be granted by any court in any civil case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the Court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MSA 27.2618.

The principal defense asserted in these two cases, both to the jury as a matter of fact, and also, to the Court as a matter of law, on motions for a directed verdict, and for a judgment notwithstanding the verdict, was that the defendant Michigan Sugar Company was not guilty of any negligence in the operation of its business or the maintenance of its premises and that the unfortunate deaths on defendant's property resulted from an unavoidable accident or the conrtibutory negligence of the parties themselves or their legal guardians.

The facts in the two cases were comparatively clear and uncontroverted. On the afternoon of December 21, 1958, 12 year old James Heider and his 8 year old half brother, David Heider, received permission from their family to take their bicycle and their cocker spaniel to set out muskrat traps in the vicinity of their homes at Sebewaing, Michigan. When they did not return at the expected time, their grandparents went out to look for them but without success. Later a search party discovered the bodies of the boys and their dog at the bottom of a pond on defendant's premises. This pond was a considerable distance inside defendants' property and was used to store water

from defendant's sugar manufacturing plant until some time in the spring when the State permitted it to be released into the Saginaw Bay. Although none of defendant's employees was shown to have specific knowledge that children trespassed upon defendant's premises to trap, they knew that trespassers came upon defendant's land during the hunting and trapping seasons and that traps were set at the ponds to catch muskrats which frequented them and actually did considerable damage to company property by digging holes in defendant's dikes. Defendant company put up "no trespassing" signs at least twice a year but knew they did not remain in place and often were ignored.

On December 21, 1958, there was no sign in the vicinity of the pond which was largely frozen over in the 12 degree below zero temperature. A pipe was discharging into the pond water which apparently melted the nearby ice. It laso formed a frothy foamlike substance which blew and billowed up a foot or more above the water and the surrounding ice and became covered with snow. There were no eye witnesses to the tragedy but the physical facts indicated that after walking across the ice on the pond, the two boys and their dog all plunged through holes in the vicinity of the water pipe and were drowned.

Defendant company certainly was carrying on a legitimate business enterprise on its own premises. It was quite clear from all the evidence in the case, however, that an extremely deceptive and treacherous condition existed in the surface of the ice around the pipe discharging water into the pond. Defendant easily could have employed some sort of a warning device and sign to serve as a notice or caution to trappers and trespassers who were known to use that area frequently. That would not have limited or interfered in any way with defendant's profitable conduct of its business.

On the basis of a careful consideration of all the evidence and the now well established law of this State, this Court concludes that neither the two boys nor their guardians

were guilty of contributory negligence in this case and that the sole, proximate cause of their deaths in this tragic accident was the negligence of the defendant company in the maintenance of its premises contrary to the following legal principle:

> "A possesor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there cause to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety." (Lyshak v. City of Detroit, 351 Mich. 230; Nielsen v. Henry H. Stevens, Inc., 358 Mich. 130; 2 Restatement of Torts, Sec. 334, 339).

This Court is inclined to agree with plaintiff's counsel that the crucial, controlling question in this case is as follows:

> "Was the jury's verdict for $125,000 damages for the death of David Heider excessive under all the circumstances?"

It certainly would have been so considered under the Michigan decisions prior to Wycko v. Gnodtke, 361 Mich. 331, as the dissenting opinion in that case so emphatically declarss. The present case of David Heider, however, was tried in the light of the then very recent ruling law which is proclaimed by the majority of the Michigan Supreme Court in the Wycko Case, supra. In other words, the trial court unequivocally accepted the statement in the majority opinion in the Wycko Case, supra, at p. 338, that, "We now reject * * * the child labor measure of the pecuniary loss suffered through the death of a minor child, namely, their probable wages less the cost of their keep, and all cases consistent therewith we now overrule.".

The case was submitted to the jury, as nearly as possible in accordance with the new rule that, "The pecuniary value of a human life is a compound of many elements,

including mutual society and protection and companionship." What these are worth in terms of dollars was not indicated by the Michigan Supreme Court, which instead expressly stated:

> "It is true, of course, that there will be uncertainties in all of these proofs, due to the nature of the case, but we are constrained to observe that it is not the privilege of him whose wrongful act caused the loss to hide behind the uncertainties inherent in the very situation his wrong has created." p. 340, supra.

Both counsel here have offered in their arguments and briefs since the trial, widely different and extremely interesting examples of the increased income David's family might expect to obtain from investing in various ways the amount of money involved in this verdict. As this Court understands the majority opinion in the Wycko Case, however, the pecuniary loss resulting to a family from the death of a child is not measured solely by the extent to which the family's material standard of living is raised or lowered, by his being wrongfully removed from it forever, but by the value which can reasonably be attributed to the loss of mutual society and companionship suffered by the surviving members of the child's family.

It would seem to this Court that the pecuniary value of "mutual society, protection and companionship" would vary vastly with the precise circumstances of the particular individuals involved and might range from a very nominal to a most substantial amount, depending upon the jury's estimate of their importance to the parties. As a matter of fact and law, this is exactly what the courts of other States seem to have held when presented with this problem, which of course has not yet been judicially reviewed in this jurisdiction. Without attempting to emulate the eloquence of higher courts, who have substantiated comparable awards in child death cases, this Court selects from among the many cases cited by plaintiff's counsel, Sandifer Oil Company v. Dew, 71 So. 2d 725, 1954, where the Mississippi

Supreme Court in affirming a $90,000 verdict for the death of a 12 year old girl uses language which appears applicable here when it states, "We cannot put a value on loss of companionship and society; that is the function of the jury." Thus this Court understands that in Stephens v. US Mobile Homes of Florida, Inc. (25 NACCA Law Journal 400), a Florida court sustained a jury verdict for $150,000 for the death of electrocution of a 2½ year old child. In the present cause, an experienced jury of responsible, intelligent, business men and housewives heard the last jury case during that term of court and after an orderly trial which appeared to be unusually free from passion, prejudice, pressure, emotionalism or material error of any kind, rendered a verdict which it believed to be reasonable and just. This Court is not now inclined to alter it on the basis of the law and the facts before it.

In considering the case of James Heider, probably the most important question for this Court to decide is the amount of damages to be awarded. This Court finds from the evidence at the trial that the deceased James Heider had lived long enough to be able to demonstrate much more clearly than his younger brother David the talents, abilities, character, and accomplishments which gave such distinct and definite promise of a useful life and a good citizen. As a consequence, it would seem to follow irrefutably that his death would occasion the greater loss, not only to the community but also to his whole family, and that therefore the damages should be higher in his than his brother's case. This Court would be inclined to reach such a conclusion as a matter of simple and obvious justice. In the opinion of this Court, however, such a result does not appear to be permissible under the Michigan statute which creates the cause of action (Courtney v. Apple, 345 Mich. 223, headnotes 3 and 6; MSA 27.711). The statute and the Michigan cases construing it seem to have considered almost every contingency except the one which confronts the Court here. In MacDonald v. Quimby, 350 Mich. 21, which contains the most exhaustive analysis of the statute, the mother as well as the wife and children of the deceased,

was permitted to participate in the recovery of damages. Both opinions of the Court apparently concurred in the conclusion that: "The term 'next of kin' as used in the death act means the nearest blood relations who suffer a pecuniary injury and not all those who would take under the statute of distribution." MacDonald v. Quimby, supra, headnote 6.

Inasmuch as the deceased James Heider apparently had no legal obligation to support his grandparents with whom he lived (MSA 16.122 and 16.125) or his half brothers or sisters (Richardson v. Detroit and M. Ry. Co., 176 Mich. 413, head note 6) or his stepmother with whom he did not live (MSA 27.712; Stahl v. Grand Rapids and Ind. R.R. Co., 57 Mich. 239, headnote 6), it would appear that whatever their actual loss may have been under the circumstances, these relatives have sustained no pecuniary, legal damages as a result of James Heider's death (MacDonald v. Quimby, supra).

As defense counsel states,

> "It must be conceded that if defendant is found guilty of negligence, the plaintiff administrator could recover funeral expenses, beyond that we think no recovery should be allowed * * * on behalf of the father because (a) he had no right to recover for the cost of rearing the child because he incurred no expense in that regard. Whatever was expended by way of rearing the child was expended by the grandparents as volunteers. He should not be permitted to recover for loss of wages offset by room and board until age 21 because, by his own conduct, he had relinquished that right."

For the reasons already briefly mentioned earlier in this opinion, as well as those so elaborately set forth in the lengthy dissenting opinion of Courtney v. Apple, 345 Mich. 223, pp. 237-260, this Court believes that to award damages only for James Heider's funeral expenses would be un-

reasonable if not actually unconscionable particularly in the light of the changed rule of law established by the Michigan court in the Wycko Case, supra. It seems obvious to this Court that under the rule in the Wycko Case supra, the plaintiff Donald Heider, father of James Heider, is entitled to damages for the costs of raising James Heider, which appear from the evidence submitted in support of plaintiff's bill of particulars to be at least $10,989.65, which is less than the average estimated in 39 Michigan Bar Journal 11 and 54 N.W. Law Review, 254. The fact that deceased's grandfather, instead of deceased's father, furnished most of this should not in the opinion of this Court relieve the wrongdoer of his liability for it, any more than the voluntary contribution of an injured employee's wages or the payment under the contract of hospital or insurance benefits relieves the wrongdoer from the damages inflicted upon the injured victim (Kurti v. Probelske, 324 Mich. 179, headnote 5; Cawood v. Earl Paige Co., 239 Mich. 485).

The other compensable element of damages which plaintiff sustained in the loss of the society and companionship of his oldest son James who had reached an age where he would have had more in common with his father and not only could have been expected to have brought for joy and satisfaction to him in the few remaining years of his life expectancy, than at any other time, should be reasonably evaluated at a minimum of $30,000, in the opinion of this Court. As a consequence, plaintiff is awarded a judgment of $40,989.65 in the case of James Heider against the defendant, with costs to be taxed in one case only.

Probably because of the size of the verdict and the consequent amount of interest which conceivably could accrue thereon, the attorneys have presented a number of authorities to support their respective contentions as to the time when interest should commence. This Court has carefully examined all of the citations and is convinced that in cases of this kind which involve unliquidated damages for personal injuries, as contrasted with actions based upon contract, or the loss of specific personal property, the great

weight of both reason and authority requires that interest be computed from the date of the judgment. Motyka v. Detroit G.H. & M. Ry. Co., 260 Mich. 396, headnote 3 and p. 398.

This rule is expressly recognized and approved in Wilson v. Dohler-Jarvis, 358 Mich. 510, a workman's compensation case which plaintiff's counsel cites to support his contention that interest should start with the decedent's death but which, on pp. 517-18 actually adopts the following language from 16 NACCA Law Journal, pp. 135-6:

> "Generally in personal injury cases, courts have declined to allow interest before the date of the judgment, whereas in actions ex contractu interest is allowed from the time of the accrual of the cause of action."

Although Larsen v. Home Telephone Company, 164 Mich. 295, headnote 8, seems to approve a different rule, this Court agrees with defense counsel that to adopt it here would be to compound the damages in improperly allowing interest twice inasmuch as the Court in its instructions to the jury followed the practice recommended in Larsen v. Home Telephone, supra, in these words:

> "It may be said that a more accurate computation would be to estimate the damages suffered to the date of the verdict and add to it the present value of prospective damages."

Probably the entire subject requires further clarification by our Supreme Court. Until then, however, it would appear that this Court is obliged to follow the rule laid down in Motyka v. Detroit Ry. Co., supra, headnote 3, which states the law that still seems to be applicable, and to award interest from the date of the entry of the final judgment in both cases.

Eugene Snow Huff,
Circuit Judge.

Saginaw, Michigan,
May 9, 1962.

APPENDIX B

OPINIONS OF THE MICHIGAN SUPREME COURT

6/7 January 1964

Before the Entire Bench.

KELLY, J.

Plaintiff brings these companion cases under the Death by Wrongful Act statute (CL 1948, §691.581 [Stat Ann 1959 Cum Supp §27.711]), claiming that his sons James (12½ years of age) and David (8 years of age) were drowned in a pond on defendant's premises and that their deaths were caused by defendant's negligence.

Plaintiff demanded a jury only in the David Heider case, and defendant's request for jury trial in the James Heider case was denied. The cases were consolidated for trial, one a jury case and the other a nonjury case.

At the conclusion of plaintiff's proofs, defendant moved for a directed verdict "for the reason that the plaintiffs have failed to produce evidence * * * that would tend to establish any responsibility on the defendant for the death of the children." The court took the motion under advisement and reserved decision in accordance with the terms of the Empson Act.

February 15, 1961, the jury returned a verdict in favor of the plaintiff-administrator of the David Heider estate in the sum of $125,000.

February 28, 1961, defendant filed its motions for new trial and for judgment notwithstanding verdict, on the grounds that the verdict was against the clear preponderance of the evidence, contrary to the great weight of the evidence, and clearly excessive.

May 17, 1962, the trial court directed the entry of a judgment in the nonjury case of James Heider in the

amount of $40,989.65, and on the same date denied defendant's February 28, 1961, motions for new trial and judgment notwithstanding verdict in the David Heider case, said motions having been under consideration by the court during the time he was deliberating on the James Heider nonjury case. Defendant then moved for new trial in the nonjury case and this also was denied, the court relying on its opinion denying the motions in the David Heider case.

Question No. 1: *WAS THE VERDICT AND JUDGMENT IN EACH CASE AGAINST THE CLEAR PREPONDERANCE OF THE EVIDENCE AND CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?*

James and David Heider were half-brothers and did not live together. James was raised by and lived with his grandparents since he was 8 days old. His mother and father (plaintiff Donald Heider) were divorced and the father contributed nothing to James' support.

David, the younger, lived with his mother and younger brother and sister 3 blocks from the grandparents' home, in Sebewaing, Michigan.

The father, plaintiff Donald Heider, was in Jackson prison serving a sentence of from 10 to 20 years on an armed robbery conviction at the time of the accident.

Defendant's 200 acre tract of land is located north of the village limits of Sebewaing. In order to conduct its sugar beet processing operation, it was necessary to prevent beet particles and waste containing limestone, calcium carbonate, et cetera, from running into the Saginaw bay. To meet this problem and the requirements of the Water Resources Commission, defendant, in 1944, commenced building a series of auxiliary ponds which finally culminated in 8 ponds, varying in size from 5.9 acres to 27.1 acres. The ponds are separated by dikes 12 feet high and wide enough to accommodate a motor vehicle for travel. There are no public roads on defendant's premises.

The pond in which the boys drowned was known as pond No. 3, 27.1 acres in size and, at the time of the accident, was around 7 feet deep. Said pond was located approximately in the center of defendant's tract of land.

A pipe approximately 4 feet from the top of the embankment of pond No. 3 emptied water and waste products into the pond. This chemical waste prevented freezing at the outlet and covered the surface of the water with a foamy substance for an area of 10 feet by 8 feet.

Sunday afternoon (December 21, 1958) the 2 boys left the home of their grandparents about 3:30 p.m., in subzero weather, informing the grandparents they were going to trap muskrats. When they failed to return, the grandmother conducted a search, to no avail. The marshal of Sebewaing was notified and the marshal, firemen, and citizens of Sebewaing conducted a search for well over an hour before any one thought of the possibility of the boys going onto defendant's property.

A bicycle was found on the C & O Railroad right-of-way 300 feet north of the public roadway and footprints led from this point along the tracks for about half a mile, then across a ditch to an island in the center of pond No. 3 and, after circling about, the steps led to the point where the pipe was emptying into the pond. There was a bunch of frozen foam about 3 feet from where the footprints ended.

The court in a written opinion held that the cause of death was the negligence of defendants in the maintenance of its premises contrary to legal principles, stating:

> "Although none of defendant's employees was shown to have specific knowledge that children trespassed upon defendant's premises to trap, they knew that trespassers came upon defendant's land during the hunting and trapping seasons and that traps were set at the ponds to catch muskrats which frequented them and actually did considerable damage to company property by digging holes in defendant's dikes. De-

fendant company put up 'no trespassing' signs at least twice a year but knew they did not remain in place and often were ignored. * * *

"On the basis of a careful consideration of all the evidence and the now well established law of this State, this court concludes that neither the 2 boys nor their guardians were guilty of contributory negligence in this case and that the sole, proximate cause of their deaths in this tragic accident was the negligence of the defendant company in the maintenance of its premises contrary to the following legal principle:

"'A possessor of land who knows, or from facts within its knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.' (Lyshak v. City of Detroit, 351 Mich 230; Neilsen v. Henry H. Stevens, Inc., 359 Mich 130; 2 Restatement of Torts, §§334, 339)."

The trial court's misinterpretation of our Lyshak and Neilsen, decisions, *supra*, requires emphasis that the legal principle enunciated in these opinions was that defendant in each instance was aware of the fact that infant trespassers, were subjecting themselves to danger upon defendant's property. To establish this important point beyond question, not only in regard to this opinion but for future reference, the following excerpts from Justice Talbot Smith's opinion in Lyshak are set forth:

"The main thrust of plaintiff's argument on appeal is devoted to the proposition that defendant city knew that children 'were constantly coming onto the golf course during the summer months, just as they had been doing for over a long period of time.' From this knowledge, says plaintiff, there arose 'a duty on the part of defendant city of Detroit to keep a lookout

for such children who might be on the golf course and, in the exercise of ordinary care, to discover their presence and the presence of infant plaintiff in a dangerous situation as presented itself on the day infant plaintiff was injured and exposed to the danger and peril of being struck by a flying golf ball.' * * *

"It is clear that the plaintiff himself was not on the golf course as a matter of right. * * * A powerfully-driven golf ball in flight is a projectile of lethal qualities, as this record amply demonstrates. * * * The difference between a golf course and a rifle range, then, as a playground for children, is a difference of degree only.

"If duty is born of danger, the duty of the city of Detroit, knowing that children frequent a certain area, is clear. * * *

"To what degree does the landowner still wear the feudal mantle of special privilege, exempting him from the ordinary rules of negligence when children (yes, trespassing children) are known to frequent land upon which he is carrying on an enterprise hazardous to them? Can he simply say, 'They are trespassers' and continue as if they were not there? Can a landowner blindly throw the firing lever and explode blasting charges in a vacant lot that, to his knowledge, is used daily as a playground by (trespassing) neighborhood children? * * *

"A distinction has been drawn between the mere condition of the premises (a child falls into a natural pond) and a dangerous situation on the premises caused by the active intervention, the affirmative acts, of the owner (the child is carelessly run down by the owner's horse-and buggy). * * *

"We have mentioned, but we have not emphasized, the distinction between an injury arising from a condition of the premises and one arising from affirmative dangerous conduct by the owner. * * * In the interests

> of accuracy, it should be pointed out that the case before us does not involve injury from the mere physical condition of the premises, whether natural or artificial, and hence many of the cases cited by the city against recovery (e.g., Hargreaves v. Deacon, 25 Mich 1; Graves v. Dachille, 328 Mich 69) are not precedent for the situation before us. Here we have injury from dangerous activities conducted in a limited area which trespassers in general are known to frequent. * * *
>
> Upon these facts, infant plaintiff, even if a trespasser, was a known trespasser."

Justices Dethmers and Edwards wrote concurring opinions in the Lyshak Case. Justice Dethmers emphasized the fact that the defendant's awareness of the infant trespasser was a controlling feature, stating:

> "Here defendants knew of the presence of small children within the range of a flying golf ball before the foursome. Whether, under such circumstances, it was negligence to drive or permit the driving of a ball in the direction of such small children presented, as I think, a question of fact for the jury."

Justice Edwards, while stating that Lyshak overruled cases "where Michigan has barred recovery for injuries involving infant trespass—holding the effect of child trespass to be identical with that of adult trespass," also said: "This case concerns a child of tender years—obviously too young to look out for himself. His presence in a place of potential danger, beside a golf course fairway, was known to agents of defendant who were on the tee at the time the golf ball was driven, which caused the loss of the boy's eye."

In Neilsen v. Henry H. Stevens, Inc., 359 Mich. 130 (relied upon by the trial court), a 7-year old boy was injured when defendant's truck collided with the boy's bicycle while he was riding it in a concrete area owned by defendant. This case had been tried and determined in the

lower court prior to the Lyshak Case. It was sent back for a new trial, but the fact that defendant knew of the child's presence on its property was made clear by Justice Edwards when he stated:

> "In *Lyshak*, as in the instant case, the Court was dealing with a fact situation where plaintiff alleged active negligence on the part of the defendant toward a minor child whose presence on defendant's property in a place of danger was known to defendant."

Lyshak referred to, but did not repudiate, our early 1872 decision in Hargreaves v. Deacon, 25 Mich 1, where we held:

> "Owners of private property are not responsible for injuries caused by leaving a dangerous place thereon—but not immediately adjourning a highway—unguarded, where the person injured was not on the premises by permission, or on business, or other lawful occasion, and had no right to be there."

Likewise, Lyshak referred to our 1950 Graves decision* but, again, did not overrule or repudiate this decision, but merely stated that the facts in Graves "are not precedent for the situation before us." In the Graves Case we considered the question of whether damages should be awarded in an action for the death of a 6½ year old boy by drowning in stagnant water which had accumulated in a sump on defendants' property incident to an excavation operation. After stating (p. 74), "We do not find in the record that to defendants' knowledge any boy had previously gone swimming in this sump, or that anyone had ever called to defendants' attention that such might happen with fatal results," we held that the trial judge had erroneously denied defendants' motion for a directed verdict because of the absence of proof that would justify a jury finding that defendants were *guilty of gross negligence.*

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* *Graves v. Dachille*, 329 Mich. 69.

Lyshak overruled cases referring to defendant's responsibility to trespassers *only* where the facts disclose that defendant owner was aware that child trespassers were entering his property and subjecting themselves to danger and possible harm.

Prior to Lyshak, decisions of this Court did not distinguish between a child and an adult trespasser. In Ryan v. Towar, 128 Mich 463, which was referred to with approval in Petrak v. Cooke Contracting Co., 329 Mich 564, it was held: (1) An invitation or a license to cross the premises of another cannot be predicated on the mere fact that no steps have been taken to interfere with such practice; (2) There is no difference between children and adults as to the circumstances that will warrant the inference of an invitation or a license to enter upon another's premises; and (3) The owner of land is not liable to trespassers thereon for injuries sustained by them not due to his wanton or wilful acts.

The trial court in the present case erroneously concluded that while it was not shown that defendant's employees had "knowledge that children trespassed upon defendant's premises to trap," he could apply the principle of Lyshak and Nielsen, *supra,* because "they knew that trespassers came upon defendant's land during the hunting and trapping season."

In the recent case of Slinker v. Wallner (1960), 258 Minn 243 (103 NW2d 377), the Minnesota supreme court upheld a directed verdict for the defendant by the trial court in an action for the wrongful death of a child by drowning, stating (pp. 248, 251):

> "In upholding recovery in these cases we have gone a long way in placing responsibility upon the occupier of premises to safeguard trespassing children. However, there must come a point where liability does not exist as a matter of law unless occupiers of land are to be held liable merely because children might stray

> onto their premises. It would seem that reasonable foreseeability is and must be a necessary prerequisite to liability. * * *
>
> "Here, the record is completely devoid of any evidence from which an inference could reasonably be drawn that the owners or occupiers of the premises involved knew or had any reason to know that children could be expected to play on these grounds any more than it is generally known that they might be found anywhere."

"Reasonable foreseeability" as a necessary prerequisite to liability is not established in this record, which is completely devoid of any evidence from which an inference could be drawn that defendant owner knew, or had any reason to know, that infant children would be trapping, playing, or trespassing upon the property.

The record sustains appellant's statement:

> "The pond in question was approximately a quarter of a mile from the nearest highway. A more desolate area could not be imagined. It was mid-winter and below zero weather. There was no reason to believe children would be in the vicinity. No employee of the defendant company had ever seen children trespassing on its premises or had specific knowledge that children trespassed thereon, as is conceded by the trial judge."

In the 1951 Petrak decisions, *supra,* we considered whether defendant-owner of road-making equipment was liable for the death of an 11-year old boy who was killed when a 1,500 to 2,000 pound beam fell on him while he and another boy were playing with a barrel of tar. In upholding a directed verdict for defendant, we, after establishing the principle that the attractive nuisance doctrine is conservatively applied in this State, said: "A reasonably prudent person would not anticipate that children in the vicinity would be likely to play with the trailer."

Applying the principles established in Petrak, we can and should conclude that "a reasonably prudent person

would not anticipate" the tragic events that led up to the death of the 2 boys on defendant's premises.

We conclude that under the evidence in this record and under the decisions of this Court, including Lyshak and Neilson, *supra*, the judgment in each case was against the clear preponderance and contrary to the great weight of the evidence.

Question No. 2: *SHOULD THE PROVISIONS OF PA 1953, NO. 201* (CLS 1956, §300.201 [Stat Ann 1958 Rev §13.1485]) *BE CONSIDERED BY THIS COURT WHEN SAID STATUTE WAS NOT RAISED IN THE PLEADINGS, NOR AT THE TRIAL, IN THE MOTION FOR NEW TRIAL, OR IN REASONS AND GROUNDS FOR APPEALS?*

PA 1953, No. 201, provides:

> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission, against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

Appellant states:

> "Candor compels our admission that this statute escaped the attention of this brief writer until it was noted in the December 8, 1962 publication of the Negligence Law Section Bulletin of the State Bar of Michigan. It is cited nowhere in the Michigan Reports. We think the force of the enactment is to deprive the plaintiff of any cause of action under the proofs in this case. It is not a matter of affirmative defense nor of limitation. Its language is to abolish any such cause of action. It has no limitation. The cause of action no longer exists. It applies to 'any person'. The statute in question expresses the public

policy of the State. It places the law with reference to trespassing hunters, fishermen and trappers, including minors, where it was prior to the more recent adjudications dealing with trespassing children and beginning with *Lyshak v. City of Detroit,* 351 Mich 230."

Appellee objects to consideration of the statute by this Court in this appeal because it was not raised in the pleadings, nor at trial, motion for new trial, or in the reasons and grounds for appeal; that it is an affirmative defense and cannot be raised as part of the general issues.

My answer to Question No. 1 discloses that without the application of this statute, on the record submitted, the verdict and judgment in each case should be set aside, but as this opinion is written before acceptance or rejection by my Associates, I am answering Question No. 2.

The general rule is well established that upon appellate review, parties cannot assume a position inconsistent with or different from that taken at the trial and are restricted to the theory upon which the case was defended in the court below.

This rule has its exceptions, and in Dation v. Ford Motor Co., 314 Mich 152, we held that the general rule that a question may not be raised for the first time on appeal to the Supreme Court is not inflexible and will not be applied when consideration of a claim sought to be raised is necessary to a proper determination of the case.

Especially is this true where an applicable statute has been overlooked. It has been held that the party's failure to call the trial court's attention to a relevant statute does not preclude the appellate court from considering it.*

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* See 4 *CJS, Appeal and Error,* §§241, 242; *Adley Express Co., Inc. v. Town of Darien,* 125 Conn 501 (7 A2d 446); *Bedenbaugh v. Adams* (Fla. 1956), 88 So2d 765; *Yannuzzi v. United States Casualty Co.,* 19 NJ 201 (115 A2d 557); *Huntress v. Huntress' Estate* (7 CCA Ill) 235 F2d 205 (61 ALR 2d 682).

There is no claim in this case that defendant was guilty of gross negligence or wilful and wanton misconduct. There is no testimony that even infers that permission was given to the boys, or that a valuable consideration was paid by them for the privilege of going upon defendant's premises.

The statute states there must be proof of (1) payment of a valuable consideration, or (2) proof of gross negligence or wilful and wanton misconduct before a party who is on the land of another for fishing, hunting or trapping can seek damages for injuries. In the absence of proof sustaining one of these requirements, the statute specifically states "no cause action shall arise."

The total lack of proof to meet any of these requirements makes this statute applicable and should be considered by this Court as one more reason why the conclusion reached in answer to Question No. 1 should also be the answer to Question No. 2.

The cases are reversed and remanded to the lower court for entry of judgments of no cause of action. Defendant may recover costs.

John R. Dethmers
Concurred with Kelly, J.

6/7 January 1964

Before the Entire Bench:

O'HARA, J.

I am obligated to vote to reverse with instructions to enter an order dismissing the declarations for failure to state a cause of action of which the court had jurisdiction. This is for the reason that the legislature abolished the cause of action here sought to be asserted. Fairly read, it seems to me the whole thrust of the declarations is that the boys entered upon the property of the defendant to trap; that defendant had knowledge that many people

did so and that defendant was ordinarily negligent in the maintenance of the premises.[1] Altering the order of the paragraphs merely for clarity, the pleadings read:

> "27. That David Heider is the minor son of the plaintiff, Donald Heider, and on the 21st day of December, 1958 said son with his brother, James Donald Heider *and their dog set out muskrat trapping.*
>
> "28. That David Heider with his brother and dog entered the defendant's premises and walked onto one of the defendant chemical ponds.
>
> "5. That the defendant knew persons came on their land where their artificial storage ponds are located to trap for muskrats, mink, etc.
>
> "21. That the defendant failed to have any warning signs and failed to maintain the property to protect children." (Emphasis this Court's.)

The wording is identical in the companion case.

The statute[2] involved is herewith set out in its entirety:

> "AN ACT restricting suits by persons coming upon the property of another for the purpose of hunting, fishing or trapping; and to declare the limited liability of owners of property within this state.
>
> "*The People of the State of Michigan enact:*
>
> "300.201 Prohibiting tort actions against landowners for recovery of damages, unless caused by negligence, etc. of owner, tenant or lessee. [M.S.A. 13.1485]
>
> "Sec. 1. *No cause of action shall arise for injuries to any person who is on the lands* of another without

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[1] In view of the statute, it matters not whether the boys were licensees, invitees or trespassers.

[2] PA 1953, No. 201 (CLS 1961 §300.201; Stat Ann 1958 Rev §13.1485).

paying to such other a valuable consideration for the purpose of *fishing, hunting or trapping, with or without permission,* against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee.

"Approved June 10, 1953." (Emphasis supplied.)

At the time of these unfortunate deaths the Constitution limited the original jurisdiction of our circuit courts to "all matters civil and criminal not excepted in this constitution and not prohibited by law." (Const 1908, Art 7, §10.[3]

No right or rights of action as pleaded here could have accrued, to the personal represenatives of either decedent, the declared acts of defendant *not* being "such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof" (CL 1948, §691.581).

With or without raising the question below, the circuit court was possessed of no jurisdiction to hear and determine the merits of plaintiffs' allegations. See the long list of authorities cited in In Re Frazer's Estate, 288 Mich 392, 394 as supporting this settled principle:

> "Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceedings."

The principle quoted was applied in Lehman v. Lehman, 312 Mich at 105 and Bank & Trust Co. v. Wayne Cir. Judge,

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[3] For the corresponding present provision, see Const 1963, Art 6, §13.

321 Mich at 45. It is controlling here; hence my vote as indicated. The situation here is the same as if plaintiff had declared for alienation of affections. Defendant, having failed to raise the jurisdictional question in due time, should not have costs.

Eugene F. Black

Otis M. Smith

Concurred with O'Hara, J.

6, 7/January 1964

Before the Entire Bench.

ADAMS, J.

I am unable to agree with Justice Kelly that the trial court misinterpreted *Lyshak v. City of Detroit*, 351 Mich 230, or *Nielson v. Henry H. Stevens, Inc.*, 359 Mich 130. The trial judge found:

> "Defendant company certainly was carrying on a legitimate business enterprise on its own premises. It was quite clear from all the evidence in the case, however that *an extremely deceptive and treacherous condition existed in the surface of the ice around the pipe discharging water into the pond.* Defendant easily could have employed some sort of a warning device and sign to serve as notice or caution to *trappers and trespassers who were known to use that area frequently.* That would not have limited or interfered in any way with defendant's profitable conduct of its business." (Emphasis added.)

There is ample evidence in the record to support the findings of the court and jury that defendant's property was frequented by trappers, hunters, skaters and other trespassers. Richard Jahr, an employee of Michigan Sugar, testified:

> "Q. Do you conduct activity on these ponds?
> "A. Well, I've trapped them, being within that area I would say for at least 20 years. • • •

"Q. Well, did they give you permission or didn't they?

"A. They actually did not give me permission, he says in his own words, for all of them *they would like to get rid of the muskrats because they do damage on the ponds,* but if I went onto them I was on my own risk.

"Q. Now, have you ever seen any evidence while you are trapping that other people trapped up there?

• • •

"A. Yes, I seen others out there trap.

"Q. How many people do you know of that trap out there?

"A. Three that I know of." (Emphasis added.)

Max Meissner, also an employee of Michigan Sugar, testified that he had been aware of the fact that people were trapping in the area and that hunters often used the land in question, as many as 30 or 40 during a hunting season.

Floyd Taylor, a truck driver living in Sebewaing, testified it was common knowledge in the community that the Sugar Company premises were a good area for trapping:

> "Yes, I think that just about everybody that did any trapping around town knew that that was one of the best areas around, to trap."

He testified that his own boy, when 14 and 15 years old, trapped on the ponds. There was also evidence of the presence of children, small footprints having been seen and the ponds having been used for skating.

The trial judge then went on to apply the proper legal principles. Justice Kelly would not restrict the rule "to trespassers *only* where the facts disclose that defendant owner was aware that child trespassers were entering his property and subjecting themselves to danger and possible harm." The requirement of reasonable care for the safety of a trespasser is subject to no such condition. *Swanson v. City of Marquette,* 357 Mich 424. I am unable to perceive the legal or lethal difference between a "powerfully driven golf ball in flight" *(Lyshak),* "a negligently driven truck"

(*Nielsen*), "an improperly maintained electrical substation or transformer vault" (*Swanson*), and "an extremely deceptice and treacherous condition * * * in the surface of the ice around the pipe discharging water into the pond."

As Justice Talbot Smith observed in *Lyshak*:

> "We accept as commonplace today the principle that there is a duty upon all men so to conduct their activities as to minimize *the likelihood* of harm to others." (Emphasis added.)

Special findings were made by the jury in answer to the following questions:

> "Question No. 1—Was the pond where the boys met their death a place where the Michigan Sugar Company knew, or should have known, that children were likely to trespass? [x] Yes [ ] No.
>
> "Question No. 2—Was the place where the boys met their death a place where a condition existed which the Michigan Sugar Company knew, or should have known, involved an unreasonable risk of death to child trespassers? [x] Yes [ ] No.
>
> "Question No. 3—Was the utility of maintaining the pond by the Michigan Sugar Company in the condition it was slight as compared to the risk to child trespassers as involved therein? [x] Yes [ ] No"

Likelihood and foreseeability are much the same thing. I do not disagree with Justice Kelly's quotation of the rule in *Slinker v. Wallner*, 258 Minn 243 (103 NW2d 377) (1960), but I do with his interpretation of the facts in these two cases where, in my opinion, likelihood of or foreseeability of possible harm existed before the tragedies occurred.

With regard to the question of damages and whether the awards were excessive or insufficient, it is necessary first of all to determine the persons who would be entitled to share in recovery. In the case of James D. Heider, the

trial court equated the term "pecuniary injury" as used in the wrongful death act (CL 1948 §691.581 *et seq.* [Stat Ann 1959 Cum Supp [27.711 *et seq.*])* with our former requirement that the beneficiary of the statutory action suffering pecuniary injury be one who was entitled to financial support from the deceased, citing *MacDonald v. Quimby,* 350 Mich 21. At the very latest, since our decision in *Wycko v. Gnodtke,* 361 Mich 331, however, we have allowed recovery of damages for pecuniary injury in such actions not withstanding the absence of an obligation by the deceased to support the person suffering such pecuniary injury. *MacDonald v. Quimby* is applicable let to the extent that it was there held, by all members of the Court, that the persons whose "pecuniarly injury" is compensable under the death act are those who, in the variant circumstances of intestate succession, might be entitled to inherit the personal property of one dying intestate. In *MacDonald,* the deceased left surviving him a widow and children, but the Court permitted recovery of the pecuniary injury suffered by deceased's mother notwithstanding the fact that, because deceased left a widow and children surviving him, his mother would not have been entitled to inherit any of his personal estate had he died intestate.

The restriction of the class to Donald Heider, father of James D. Heider, by the trial judge was improper, since, in this case, there were other members of the class who should have been considered. The trial court said:

> "This Court finds from the evidence at the trial that the deceased James Heider had lived long enough to be able to demonstrate much more clearly than his younger brother David the talents, abilities, character, and accomplishments which gave such distinct and definite promise of a useful life and a good citizen. As a consequence, it would seem to follow irrefutably that his death would occasion the greater loss, not only to the community but also to his whole family, and that

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* See, currently, CLLS 1961, §600.2922 (Stat Ann 1962 Rev §27A.2922).

> therefore the damages should be higher in his than in his brother's case. This Court would be inclined to reach such a conclusion as a matter of simple and obvious justice."

Since the court did not make an award to cover pecuniary injury to all of James' next-of-kin, it will be necessary to remand the case for a reconsideration of such award.

Some further comment is appropriate with regard to the assessment of damages which the trial judge did made. He awarded $10,989.65 for the cost of raising James. The sum was incorrectly allocated to Donald Heider, father of James, who did not provide such cost. It should have been allocated to James D. Heider's grandfather, who incurred the cost, and who, being within the statutory class, would be entitled to recover.

The trial judge also awarded $30,000 for loss of the society and companionship of James Heider by his father, Donald Heider, who was 33 years old at the time of the trial. James was the son of his first marriage. His wife deserted the child. Her whereabouts are unknown. Heider conributed nothing to the support of James. He was separated from his second wife. In 1953, he was arrested for nonsupport. In 1957, he pleaded guilty to robbery and was sentenced to the State prison of southern Michigan. He contracted cancer and was discharged from prison July 6, 1959, on a special parole. He saw James frequently and went hunting and fishing with him. At the time of trial he had a life expectancy of two to five years. An assessment of $30,000 for the loss of society and companionship by this father upon this record cannot but raise questions. Since the assessment of damages will be redetermined, on remand for further proceedings, we need not determine whether the award made for loss of the child's society and companionship by his father was excessive. Upon retrial the court should consider carefully all elements of pecuniary injury suffered by all members

of the statutory class and he should issue the certificate authorized by the wrongful death act setting forth the amount of such damages and the proportion thereof which represents the pecuniary loss suffered by each of the members of the statutory class.

In the case of 8-year-old David Heider, the jury awarded damages of 125,000. It is asserted that this sum is excessive, against the clear preponderance of the evidence and contrary to its great weight. Appellant states:

> "Mrs. Heider, with the $125,000, at her present age would be able to purchase an annuity which would pay her a guaranteed monthly income of $455.00 for her lifetime."

The loss of companionship in David's case runs not only to the father and mother but also to a younger brother and sister. The amount of damages recoverable in actions for death by wrongful act is one peculiarly within the province of the jury. Taking into account the total family relationship, the probable dependency of the mother upon David, and the loss to the family group of the life of David over a useful lifetime, we do not find the verdict excessive.

With regard to PA 1953, No. 201 (CLS 1961, §300.201 [Stat Ann 1958 Rev §13.1485], I am unable to agree with either Justice Kelly or Justice Black. [The declarations do not disclose the applicability of PA 1953, No. 201 to bar plaintiff's asserted causes of action. Paragraphs 4, 5, and 6 of each declaration allege that the defendant knew that people went upon defendant's lands to hunt, trap, fish, and for other purposes; paragraph 27 of each declaration alleges that the two deceased boys and their dog "set out muskrat trapping"; and paragraph 28 of each declaration alleges that the boys and their dog entered the defendant's premises and walked upon one of the defendant's chemical ponds. Standing alone, such allegations are not sufficient, as it is claimed, to invoke the statutory bar of PA 1953, No. 201, on the conclusionary assumption that

the boys were "on the lands of another * * * for the purpose of fishing, hunting or trapping." Nor, of course, did the defendant plead any facts from which either the trial court or we properly could conclude that the boys' purpose in going upon defendant's land was one of the purposes named in the statute which would bar the causes of action sought to be asserted. Finally, the record as made below fails to disclose any direct evidence that the boys in fact went upon the defendant's lands to fish, hunt, or trap.]

Dation v. Foard Motor Co., 314 Mich 152, is cited by Justice Kelly in support of the proposition that, while usually a question may not be raised for the first time on appeal to the Supreme Court, the rule is not inflexible. In *Dation*, this Court was dealing with an appeal from the workmen's compensation department. A question of law arose upon the appeal which admittedly the department (as a fact finding body) could not settle even if the matter had been remanded to it. The entire question being before this Court, the Court lected to pass upon it.

The problem has not received uniform treatment. Plaintiff cites *Hollister v. Kinyon's Estate*, 195 Mich 261; *Selznick Enterprises v. Garson Productions*, 202 Mich 106; *D & W Rottschafer Real Estate v. Morris*, 245 Mich. 192; and *Shaver v. Associated Truck Lines*, 322 Mich 323. Counsel for defendant stress *Morris v. Radley*, 306 Mich 689, in support of the exception to the rule and argue that we should apply the exception here to avoid a miscarriage of justice because of the inadvertence of counsel in overlooking and failing to raise the application of the statute before the trial court. This is not a proper case to apply the exception. Only when the matter was presented to the trial judge and he refused to rule, or, under the clearest of circumstances, where it is unquestioned that the entire matter is before this Court, should the exception prevail.

Such is not this case in which the question is first presented here as an afterthought and accorded cursory treatment and brief. For these reasons it is not applicable

at this late juncture in the case of David Heider. Litigation must come to an end. Defendant has had its day in court with ample opportunity to raise and present all defenses. It is not the function of this Court to correct, on review, the inadvertence or failure of counsel to present what might have been a defense.

In the case of James D. Heider, upon remand the trial court will determine any questions of fact which may be raised and especially the question as to whether he went on "the lands of another * * * for the purpose of fishing, hunting or trapping." The court will also consider and determine any issues with regard to the legality and construction of the act which may be raised, such as whether a minor is a "person" within the meaning of the statute, the word "person" being undefined and subject to construction in the light of a strong public policy favoring the protection of minors; whether the classification of the statute violates the due process clauses of the United States and Michigan Constitutions and the equal protection clause of the United States Constitution.

The judgment in the case of Donald Heider, Administrator for the Estate of James D. Heider, is remanded for consideration of the applicability of PA 1953, No. 201, supra, and for possible reassessment of the damages therein. Costs to neither party, each having prevailed in part.

The judgment in the case of Donald Heider, Administrator for the Estate of David Heider, is affirmed. Costs to appellee.

Theodore Souris

Thomas M. Kavanagh

Concurred with Adams, J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 48

HERBERT HEIDER, Administrator for the Estate of JAMES D. HEIDER, Deceased, *Petitioner,*

v.

MICHIGAN SUGAR CO., a Michigan Corporation, *Respondent,*

and

HERBERT HEIDER, Administrator for the Estate of DAVID HEIDER, Deceased, *Petitioner,*

v.

MICHIGAN SUGAR CO., a Michigan Corporation, *Respondent.*

BRIEF OF RESPONDENT

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257. Jurisdiction under this statute depends on federal questions being seasonably raised in the state courts. As is set forth in our brief under Point I, none of the questions raised here was timely raised below. Thus, no federal question is properly before this Court and the *writ* of *certiorari* should be dismissed.

QUESTIONS PRESENTED

I

Are the federal questions raised by Petitioner properly before this Court when such questions were raised for the first time in a petition for rehearing to the Michigan Supreme Court which denied the petition without opinion?

II

Does a Michigan statute limiting the liability of landowners in the case of trespassers who are on the land for hunting, fishing and trapping violate the equal protection guarantees of the 14th Amendment?

III

Can due process be construed to prevent a State Supreme Court from dismissing a complaint for failure to state a cause of action under a state statute when the statute was raised for the first time on appeal; while the state Supreme Court considered the applicability of the statute, no claim was made that any new facts could be shown which would render the statute inapplicable; and the statute had been enacted many years prior to the suit so that no claim of surprise at the existence of the statute would be justified?

SUMMARY OF ARGUMENT

I

Neither of the federal questions posed by Petitioner is properly before this Court. The Court will not consider a case on certiorari when the petitioner had failed to raise the federal question at the appropriate stage of the state court proceedings. *Mutual Life Ins. Co.* v. *McGrew,* 188 U.S. 291, 23 S. Ct. 375, 47 L. ed.

480 (1903); *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 53 S. Ct. 98, 77 L. ed. 231 (1932); *Great Northern Ry. Co.* v. *Sunburst Oil and Refining Co.,* 287 U.S. 358, 53 S. Ct. 145, 77 L. ed. 360 (1932); *Bailey* v. *Anderson,* 326 U.S. 203, 66 S. Ct. 66, 90 L. ed. 3 (1945); *Wilson* v. *Cook,* 327 U.S. 474, 66 S. Ct. 663, 90 L. ed. 793 (1946); *Stembridge* v. *Georgia,* 343 U.S. 541, 72 S. Ct. 834, 96 L. ed. 1130 (1952); *Edelman* v. *California,* 344 U.S. 357, 73 S. Ct. 293, 97 L. ed. 387 (1953); *Ferguson* v. *Georgia,* 365 U.S. 570, 81 S. Ct. 756, 5 L. ed. 2nd 783 (1961); *Beck* v. *Washington,* 369 U.S. 541, 82 S. Ct. 955, 8 L. ed. 2nd 98 (1962); Stern and Gressman, *Supreme Court Practice,* section 3-27 (3rd Edition 1962). And where, as here, the questions are not raised until the petition for rehearing before the State Supreme Court, this Court has refused to consider the case on the merits. *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231 (1932). Since Petitioner had adequate opportunity to raise all federal issues before the Michigan Supreme Court, the limited exception to this jurisdictional requirement stated in *Saunders* v. *Shaw,* 244 U.S. 317, 37 S. Ct. 638, 61 L. ed. 1163 (1917) would not apply.

II

A

The challenge made by Petitioner to the constitutionality of Act 201 is groundless. That statute provides that no cause of action shall arise from injuries to any person who is on the land of another for the purpose of fishing, hunting, or trapping, unless such person has paid the owner compensation for such activity, or unless the injuries are caused by the gross negligence or the wilful and wanton misconduct of the landowner. It is difficult to take seriously the conten-

tion that the classification of fishermen, hunters and trappers is an invidious classification. There are at least two sound reasons of policy which could explain the statute and the classification. First, the legislature may have been trying to deter trespassers. It may have felt that stronger deterrents were required against those who hunt, fish or trap than against other kinds of trespassers. These sportsmen are armed with implements of destruction which may be hazardous to the owner or his livestock or fowl. These are the trespassers who too frequently are oblivious of the rights of the property owners in their quest for game. A second possible purpose of the statute is to encourage landowners to make their land and water areas available to the public for designated recreational purposes by limiting the landowners' liability to such recreational users. A legislative decision that those in greatest needs of access to large areas of privately owned land are hunters, trappers, and fishermen could hardly be challenged as arbitrary. The weakness of the Petitioner's position is further highlighted by the existence in many states of similar legislation, which, in many cases, explicitly asserts a purpose to encourage landowners to make available their land to various sportsmen.

B

Petitioner's principal argument that he was denied a day in court by the action of the Michigan Supreme Court in deciding the case on the basis of Act 201 even though this Act had not been considered before the trial court is equally devoid of merit. The statute was enacted in 1953 and should have been known as well to Petitioner as to Respondent. Nothing in Respondent's conduct and no action of any state court precluded Petitioner from knowing about the existence of the

statute. It was Petitioner's responsibility to plead and prove his case according to Michigan law. *In re DelMonte's Estate,* 340 Mich. 165, 65 N.W. 2d 309 (1954); *Michaelson* v. *Simula,* 264 Mich. 457, 250 N.W. 264 (1933); *Naudzius* v. *Lahr,* 253 Mich. 216, 234 N.W. 581 (1931). Yet after pleading that James and David Heider "set out muskrat hunting", Petitioner did not allege either gross negligence or payment of compensation. Had the trial court interpreted the statute to require the pleadings which the Michigan Supreme Court later required, Petitioner would have had no constitutional claim. But Petitioner contends that because the dismissal for failure to state a cause of action was by the state Supreme Court, he was deprived of a hearing on the factual questions of whether the statute was applicable or its conditions were satisfied. However, this claim has no support in the record. The applicability of the Act 201 was directly in issue before the Michigan Supreme Court. Yet Petitioner did not claim, at any time, that any state of facts yet unproved would render the Act inapplicable. He at no time indicated that any new evidence could be presented or that any factual hearing should be required if the Michigan Supreme Court found the Act applicable. At no time did Petitioner move for leave to amend the complaint. Under these circumstanes, the Michigan Supreme Court could constitutionally rely on the pleadings and on the record before it in determining whether the statute was to be applied. And the record contains statement after statement from which the court could justifiably conclude that the statute was applicable and that its conditions were not complied with. Thus, after full hearing on the question whether Act 201 could or should be applied to bar the Petitioner's claim in this case, the Michigan Supreme Court found for Respondent. There was no denial of a hearing.

This case is unlike *Saunders* v. *Shaw,* 244 U.S. 317, 37 S. Ct. 638, 61 L. ed. 1163 (1917), where the state Supreme Court, on rehearing, reversed its decision on the basis of a United States Supreme Court decision which came down after the issuance of the original opinion by the Supreme Court of the state and in the decision on rehearing made a finding on a disputed issue of fact on which the defendant had no opportunity to be heard. Here, there was no contested issue of fact before the Michigan Supreme Court. Petitioner himself had admitted or established all the relevant facts. While, in *Saunders,* the defendant had taken all necessary procedural steps on his behalf, in the instant case, Petitioner failed to set out a cause of action under Michigan law. Furthermore, the decision of the Michigan Supreme Court was not based on a supervening change in the law but on a reasonable interpretation of a statute which predated the litigation. See *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 50 S. Ct. 451, 74 L. ed. 1107 (1930); *Butler Bros.* v. *McColgan,* 315 U.S. 501, 62 S. Ct. 701, 86 L. ed. 991 (1942). The question of the application of the statute was at issue before the Michigan Supreme Court and was fully argued there. At that time Petitioner did not indicate that the record was in any way deficient or that a new hearing should be required. Petitioner had his full day in court.

STATEMENT OF THE CASE

This case involves two suits in the Circuit Court of Saginaw County, Michigan, by the administrator of the estates of two minor children, James and David Heider, to recover damages from Michigan Sugar Company for the deaths of the two children which occurred on December 21, 1958. The gist of the plain-

tiffs' pleadings was that the boys were muskrat trapping; they had some traps with them and they went onto a frozen pond on Respondent's land; the ponds were frozen except in the region immediately adjacent to a spot in the pond where Respondent discharged waste products; these waste products have a chemical in them which creates a foamy appearance like ice; Respondent knew that children utilized this land for the purpose of trapping, and, in the exercise of "ordinary care",[1] it should have known that persons walking on the frozen pond would have been misled by the foamy substance and would believe the entire pond was frozen, and could drown (R. 2-5, 13-14, 31-33, 56-58).

Judgment in the Circuit Court was entered for the Petitioner in both cases, and Respondent appealed to the Michigan Supreme Court. There Respondent, in its opening brief, for the first time called to the Court's attention Act No. 201 of the Michigan Public Acts of 1953 providing that no cause of action shall arise from injury to any person who is on the lands of another for the purpose of fishing, hunting or trapping unless a showing is made either that the person was on the land as a result of a payment of a valuable consideration for the activity or unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the landowner. Although this statute was enacted in 1953, Respondent's counsel was unaware of its existence until he started to brief the case for the Michigan Supreme Court. Apparently, the trial court and Petitioner's counsel were also unaware of the statute; in any event, Petitioner made no reference to it in the

[1] See ¶¶ 16 and 17 of complaints (R. 3, 32); see also Petition for Certiorari, p. 9, where Petitioner concedes that he tried the cases "under the theory of ordinary negligence of a landowner."

complaints or in any of the proceedings in the Circuit Court. In the Michigan Supreme Court, Respondent requested the Court to consider Act 201, cited authorities as to the power of the Court to consider the Act even though raised for the first time at the appellate level, and requested the Court to reverse the judgment of the Trial Court with or without a new trial (Appendix A, pp. 1a-11a).[2]

Petitioner in his Brief before the Michigan Supreme Court objected to the consideration of Act 201 by that Court because the Act was not properly and timely raised. He cited a number of state authorities which he maintained held that the Michigan Supreme Court should not consider the statute. Petitioner went further and argued that the cited statute in any event should not be construed as applying to minors (Appendix A, pp. 11a-12a).

The Michigan Supreme Court by a 5 to 3 vote reversed the judgment of the Trial Court and ordered the complaint dismissed. Two of the five judges were of the opinion that even without considering Act 201, a reversal was required since Petitioner's evidence as a matter of law failed to show that Respondent was guilty of ordinary negligence (R. 325). Five Judges were of the opinion that the Court had the right to consider Act 201 and that Petitioner had failed to show that he had a cause of action within the meaning of that Act (R. 325-330). Three judges dissented, holding that it was not appropriate for the Michigan Supreme Court to consider Act 201 when it was first

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[2] We are reprinting in Appendix A to this Brief the portions of both Respondent's and Petitioner's Briefs before the Michigan Supreme Court containing the arguments with respect to Act 201.

injected into the case at the appellate level (R. 335-337).

Petitioner then filed an Application for Rehearing with the Michigan Supreme Court (R. 339-346). Here for the first time[3] Petitioner raised the issues that Act 201 violated the Fourteenth Amendment of the United States Constitution and that the action of the Michigan Supreme Court in considering Act 201 when first raised on appeal deprived Petitioner of due process of the law. The Application for Rehearing was denied by the Michigan Supreme Court without opinion by a 5 to 2 vote (R. 347).

ARGUMENT

I.

NO FEDERAL QUESTION IS BEFORE THIS COURT

This case is here on certiorari under 28 U.S.C. § 1257 on the claim that Petitioner has been deprived of rights guaranteed to him by the Fourteenth Amendment of the Constitution. Petitioner bases his constitutional argument on two points. First, he argues that he was deprived of his constitutional rights by virtue of the fact that the Michigan Supreme Court reversed the judgment in his favor on the basis of Act 201 when that Act was not considered in the Trial Court proceedings and was raised for the first time on appeal to the Michigan Supreme Court. Secondly, Petitioner argues that Act 201 is unconstitutional in that it denies the equal protection of the law required by the Fourteenth Amendment.

Respondent contends that these questions are not presented by the record. The Court will not consider a

[3] See Petition for Certiorari, p. 8; Brief for Petitioner, p. 9.

case on certiorari when the petitioner has failed to raise the federal question at the appropriate stage of the state court proceedings. *Mutual Life Ins. Co.* v. *McGrew,* 188 U.S. 291, 23 S. Ct. 375, 47 L. ed. 480 (1903); *American Security Co.* v. *Baldwin,* 287 U.S. 156, 53 S. Ct., 98, 77 L. ed. 231 (1932); *Great Northern Ry. Co.* v. *Sunburst Oil and Refining Co.,* 287 U.S. 358, 53 S. Ct. 145, 77 L. ed. 360 (1932); *Bailey* v. *Anderson,* 326 U.S. 203, 66 S. Ct. 66, 90 L. ed. 3 (1945); *Wilson* v. *Cook,* 327 U.S. 474, 66 S. Ct. 663, 90 L. ed. 793 (1946); *Stembridge* v. *Georgia,* 343 U.S. 541, 72 S. Ct. 834, 96 L. ed. 1130 (1952); *Edelman* v. *California,* 344 U.S. 357, 73 S. Ct. 293, 97 L. ed. 387 (1953); *Ferguson* v. *Georgia,* 365 U.S. 570, 81 S. Ct. 756, 5 L. ed. 2nd 783 (1961); *Beck* v. *Washington,* 369 U.S. 541, 82 S. Ct. 955, 8 L. ed. 2nd 98 (1962); Stern and Gressman, *Supreme Court Practice* Section 3-27 (3rd Edition 1962).

The record shows that in the Michigan Circuit Court Petitioner failed to assert any claim concerning the unconstitutionality of Act 201. This Act was first called to the attention of the Michigan Supreme Court in connection with the opening Brief of Respondent on its appeal from the judgment of the Circuit Court. (See Appendix A) Included in the Statement of Questions Involved was Question X, reading as follows:

> "Does Act 201, Public Acts of 1953, page 281 (1948 C. L. 300.201; M.S.A. 13,1485) require this Court to reverse the Trial Court with or without a new trial, even though it was not brought to the attention of the Trial Judge?"

Respondent in its Brief set forth the language of Act 201 and cited a number of authorities supporting its contention that under state law the Court should

consider the statute and proceed to reverse the judgment either with or without a new trial. Petitioner in his Brief in the Michigan Supreme Court objected to that Court considering Act 201 arguing that it was too late to inject Act 201 into the proceedings. Petitioner disagreed with the cases cited by the Respondent and set forth a number of Michigan State cases which he claimed required the Supreme Court to reject Respondent's request to consider Act 201. Petitioner also argued that as a matter of construction Act 201 should not be held applicable to minors.

Despite the fact that Respondent had made it quite clear in its Brief that it was urging the Michigan Supreme Court to consider Act 201 and on the basis of such statute to reverse the judgment in favor of Petitioner either with or without a hearing, Petitioner made no claim in his presentation before the Michigan Supreme Court that Act 201 was a violation of the Federal Constitution or that a violation of due process would occur if the Michigan Supreme Court were to reverse the judgment on the basis of the record made. Petitioner restricted his argument to state considerations as to why Act 201 should not be considered.

The Michigan Supreme Court adopted the reasoning of Respondent. It held that it had the right to consider Act 201 and reversed the judgment without ordering a new trial.

Petitioner then filed an Application for Rehearing with the Michigan Supreme Court. (R. 339-346) In that pleading Petitioner for the first time argued that Act 201 was unconstitutional and that the procedure followed by the Michigan Supreme Court was in contravention of the Fourteenth Amendment. The Michigan Supreme Court refused to consider the points

thus raised by Petitioner and denied the Application for Rehearing without an opinion. Two judges dissented from the order denying the Application for Rehearing, but they too did not write an opinion (R. 347).

American Surety Co. v. *Baldwin, supra,* is on all fours with the instant case. In that case, Baldwin had filed a suit in Idaho District Court for damages against Singer Sewing Machine Company and Anderson, its employee, for injuries to plaintiff resulting from an automobile accident. Judgment in the District Court was for Baldwin. Both defendants appealed, and American Surety Company filed a supersedeas bond. The Supreme Court of Idaho reversed the judgment against Singer Sewing Machine Company but affirmed the judgment as to Anderson. When Anderson failed to pay the judgment, Baldwin went into the Idaho District Court and had judgment entered against American Surety Company without notice. Three days after the entry of the judgment by the Idaho District Court, the Surety Company filed a motion in that Court to vacate and set aside the judgment against it. All of the grounds urged as the basis for relief were state law grounds. The District Court granted the motion of the Surety Company and set aside the judgment. Plaintiff thereupon appealed to the Idaho Supreme Court. Here, too, no federal questions were raised The Supreme Court of Idaho ordered the judgment for plaintiff reinstated holding that the Surety Company had misconceived its remedy. It should have filed a direct appeal to the Idaho Supreme Court from the judgment of the Idaho District Court entering a judgment against it without notice rather than filing a motion with the District Court to vacate and set aside that judgment. The Surety Company filed a Petition for Rehearing with the Idaho Supreme Court and for

the first time raised constitutional questions as to the validity of entering a judgment against it without notice. This Petition was denied by the Idaho Supreme Court without opinion.

On Petition for Certiorari, this Court dismissed the writ of certiorari saying (287 U.S. 156, 163-164, 53 S. Ct. 98, 100-101, 77 L. ed. 231, 236):

> "The federal claim there made [in the Petition for Rehearing] cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings, but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. . . . This is not a case where, as in Saunders v. Shaw, 244 U.S. 317, 320, the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court."

In the instant case, Petitioner had adequate opportunity to raise all federal issues at that stage of the proceedings when Respondent in the Michigan Supreme Court raised the applicability of Act 201 to the matters in issue. Petitioner responded to the opportunity by challenging Act 201 and the right of the Michigan Supreme Court to apply it on state grounds, not on any federal grounds. As in *Baldwin*, Petitioner chose not to raise federal grounds until he filed an Application for Rehearing. The Supreme Court of Michigan refused to consider the arguments raised in the Application for Rehearing. The federal questions have never been passed upon by the Michigan Supreme Court,

Petitioner having failed to raise them at the appropriate time. These questions are therefore not properly before the Court. See *Mutual Life Ins. Co.* v. *McGrew, supra; American Surety Co.* v. *Baldwin, supra; Bailey* v. *Anderson, supra.*

A limited exception to the above rule is made where "the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding. . . ." *Saunders* v. *Shaw,* 244 U.S. 317, 320, 37 S. Ct. 638, 640, 61 L. ed. 1163, 1165 (1917). However, this exception can provide no comfort to Petitioner. The act of the Michigan Supreme Court here could not have been unexpected. Act 201 was in existence before Petitioner filed his complaints in the Circuit Court. He, as well as Respondent had overlooked it. In Respondent's opening Brief in the Michigan Supreme Court, Act 201 was called to the court's attention and the question of its application was argued in the briefs of both parties. No surprise to Petitioner was involved, no unanticipated result.[4] Petitioner might have hoped that he had persuaded the Supreme Court of Michigan as a matter of state law not to adopt the arguments urged by Respondent. However, a party cannot sit back and take a chance that the state Supreme Court will follow the line of authorities urged by him rather than those presented by the opponent. *American Surety Co.* v. *Baldwin, supra.* Nor should Petitioner have been surprised that the Michigan Supreme Court might reverse without remanding for a new trial. Respondent's Brief before the Michigan Supreme Court (App. A, p. 11a) urged that the trial court judgments be reversed

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[4] Had the Michigan Supreme Court raised Act 201 *sua sponte* and not permitted the parties to file briefs on the subject, an argument based upon *Saunders* v. *Shaw* would be understandable.

"with or without a new trial even though the statute was not considered in the Court below." Yet Petitioner at no time asked the state Supreme Court for a new trial in the event of reversal. In light of Petitioner's failure to indicate to the Michigan Supreme Court that a new trial was necessary or useful, that any new evidence could be presented, or that any factual dispute was involved, there is no basis for a claim of surprise that the reversal was not accompanied with a new trial. Thus, there is no ground for arguing that Petitioner was confronted with a ruling that he could not reasonably anticipate or by a supervening act over which he had no control. The exception of *Saunders* v. *Shaw* is not applicable.

II.

PETITIONER HAS NOT BEEN DEPRIVED OF CONSTITUTIONAL RIGHTS

Petitioner levels a twofold attack on the judgment of the Michigan Supreme Court; both aspects of the attack are based upon the Fourteenth Amendment. First, he urges that Act 201 drawing a distinction between different types of trespassers violates the Equal Protection Clause. Second, he argues that the procedure of the Michigan Supreme Court in ordering Petitioner's complaints dismissed without a new trial denied him due process of law. Neither argument is well taken.

A.

Act 201 Is Constitutional

Act 201 was enacted in 1953. It provides that no cause of action shall arise for injuries to any person who is on the land of another for the purpose of fishing, hunting or trapping, unless such person has paid the owner compensation for such activity, or unless the injuries were caused by the gross negligence or the

wilful and wanton misconduct of the land owner. Petitioner urges (Br. 18-21) that the statute is unconstitutional because it denies equal protection of the law. It is Petitioner's position that the statute creates an invidious discrimination as between minors who, without paying compensation, come onto the land of another for swimming, skating, camping, or similar activities and other minors who, without paying compensation, come onto the land of another for hunting, fishing, or trapping.[5] As to the latter, if compensation is not paid, there is only a duty of avoiding gross negligence or wanton and wilful misconduct. As to the former, the common law of Michigan with its varying standards applies.[6] It is Petitioner's position that as a matter of equal protection it is unreasonable for a state legislature to draw this distinction.

Petitioner states that Act 201 creates an invidious discrimination but does not demonstrate why this is so. The cases are to the contrary. State legislatures have extremely broad power to draw distinctions between different types of activity and to attach vary-

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[5] It should be pointed out that Act 201 is not limited to minors as Petitioner seems to imply. The Act is applicable to adults and minors alike. In the Court below, Petitioner (App. A, 12a-14a) urged the Michigan Supreme Court to construe Act 201 as not applicable to minors; that Court rejected the argument.

[6] The degree of care owed to a trespasser in Michigan under its common law depends on whether the trespasser is a minor or adult and also presumably on whether the trespasser is an invitee or licensee. Compare *Lyshak* v. *City of Detroit*, 351 Mich. 230, 88 N. W. 2d 596 (1958), with *Morris* v. *Lewis Mfg. Co.*, 331 Mich. 252, 49 N. W. 2d 164 (1951). Under Act 201 a single standard is provided for both minors and adults. That Act makes it clear that unless compensation is paid, no cause of action arises for injuries to those on the land of another for hunting, fishing or trapping, even though the trespasser is an invitee, licensee, or has the consent of the landowner unless there is a showing of gross negligence or wilful and wanton misconduct.

ing consequences to different types of conduct. This Court, in upholding an Oklahoma statute prohibiting opticians from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist stated:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think.... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.... The legislature may select one phase of one field and apply a remedy there, neglecting the others.... The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical of Okla.*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563, 573 (1955).

It is difficult to see how Petitioner can seriously contend that Act 201 makes an invidious discrimination. While the legislative history of Act 201 is not available to cast light on the legislative purpose of the Act, it is easy to see why the Michigan legislature could have thought the statute was necessary. There are at least two sound reasons of policy which suggests themselves. First, the legislature could have thought that somewhat stronger deterrents were required against those who trespass on the land of others for the purpose of hunting, fishing or trapping than against other kinds of trespassers. The hunter, the trapper, the fisher is armed with implements of destruction which may be hazardous to the owner or his livestock or fowl. Ordinary campers and swimmers normally are not so armed. During hunting and trapping season, it is all too common to read in the newspapers accounts of trespassers, who, in their quest for game, are en-

tirely oblivious of the rights of property owners. It is easy to visualize broken fences, littered fields, and other evidence of trespassers' depredations during the hunting and trapping season. Thus, it is not surprising that the Michigan legislature sought to register its determination to protect legitimate owners and possessors of land, if not against their wilful trespassers, at least against the further insults of actions in court to recover damages because property has not been kept safe for such intruders.

Second, Act 201 could serve the purpose of encouraging landowners to make their land and water areas available to the public for designated recreational purposes. Under the Act, landowners are assured that if they give their permission to persons to use their land for recreational activities, they will not be subjected to damage actions for injuries to those who go on the land for those recreational purposes unless the landowners receive compensation or are guilty of wanton and wilful misconduct. Under the common law, landowners could be responsible for damages if the persons who came on the land were licensees or invitees. Express consent certainly created a status of invitee or licensee, but in many cases such status was found to exist without express consent from the mere toleration of the trespass. See *Lyshak* v. *City of Detroit, supra.* Without legislation such as Act 201 landowners could not be sure that they were entitled to protection against damage claims from trespassers. They, therefore, had every incentive to close off their land to persons desiring to use it for recreational purposes. Act 201 encourages landowners to open their land for recreational purposes by assuring them that they will not be lured into damages by any implied consent or invitee fiction. Indeed, they are advised that

they can even give their express consent for the use of the land and still not be responsible for damages unless they either receive compensation or they are guilty of wilful and wanton misconduct.[7] It is of no constitutional concern that the Michigan legislature proceeding to deal with the problem concluded that those in greatest need of access to large areas of privately owned land throughout Michigan were the hunters, trappers and fishermen. Although the legislature might have determined that other sportsmen had need for access to private land, the Michigan legislature was entitled to address itself to that aspect of the problem which seemed to it most urgent or the most obvious.[8]

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[7] See Note, 1964 Wisc. L. Rev. 705. It is there pointed out that the forces behind a Wisconsin statute of somewhat the same type as Act 201 were the forest owners who wanted help in controlling large deer herds and also organizations representing sportsmen. The writer refers to the crisis in recreation involved in the growing shortage of land available for recreational uses. He concludes that "recreational demand has reached the point where sportsmen are willing to assume these risks as the price of gaining access to prime recreational resources such as forests and wetlands, held in private ownership." (p. 713).

[8] It is of interest to note that in 1964, the Michigan legislature amended Act 201 so as to extend the provisions which theretofore had been limited to those who came onto the land of another for the purpose of hunting, fishing, and trapping to include also those who came onto the land of another for the purpose of "camping, hiking, sightseeing, or other similar outdoor recreational uses." Apparently, experience has taught the Michigan legislature that the original objective which Act 201 was designed to achieve is not confined to fishing, hunting and trapping. The scope of the statute has now been made much wider. There is no constitutional infirmity involved in the legislature approaching a problem piecemeal, tackling only the immediate problem, leaving for later consideration and experimentation amendments to the Act in the event that experience should show that further action is required. *Silver* v. *Silver*, 280 U. S. 117, 50 S. Ct. 57, 74 L. ed. 221 (1929); *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80, 66 S. Ct. 850, 90 L. ed. 1096 (1946); *Williamson* v. *Lee Optical of Okla.*, *supra*.

Michigan is not alone among the states in limiting the liability of landowners who permit the use of their land for various recreational purposes. A number of these states have clearly spelled out the purpose of the legislation to promote recreational opportunities on private land.[9] Others like Michigan have remained silent as to the purpose of the legislation but have protected landowners by limiting their liability.[10] Thus it is clear that the problem of dealing with trespassers who use the land of others for recreational purposes has come to the attention of many states and these states have attempted to deal with the problem in much the same manner as Michigan's Act 201. The existence of these statutes in other states is compelling proof that the problem towards which Act 201 is directed is a real one, and that the method of dealing with it is one that commends itself to reasonably minded legislatures of other states in addition to Michigan.

Petitioner (Br. 19-21) has cited two cases to support his argument. Neither is remotely in point. *Oyama* v. *California,* 332 U.S. 633, 68 S. Ct. 269, 92 L. ed. 249 (1948), involved a provision in the California alien land law forbidding ownership of agricultural lands by aliens ineligible to citizenship; land held in violation of the statute escheats to the state. The Act further provides that where land is conveyed to a person ostensibly

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[9] Fla. Stats. Ann. § 375.251 (Supp. 1965); Smith-Hurd Ill. Stats. Ann., ch. 70, §§ 31 to 37 (Supp. 1965); Kan. Stats. Ann. §§ 58-3201 to 3207 (Supp. 1965); Baldwin's Ky. Rev. Stats. Ann., pt. 2, S.B. 311 (Supp. 1966); Minn. Stats. Ann. §§ 87.01 to .05 (1964); Neb. Rev. Stats. §§ 37-1001 to 1008 (Supp. 1965); and W. Va. Code Ann. §§ 2200(31) to (36) (Supp. 1965).

[10] We have set forth in Appendix B the citations to the various State statutes which deal with limitation of liability to trespassers for recreational purposes.

eligible to own land but where the consideration has been paid by an ineligible alien the presumption arises that the transfer was for the purpose of evading the statute. In *Oyama,* land was conveyed to an American citizen of Japanese ancestry with the consideration being paid by the Japanese father, an ineligible alien. California instituted escheat proceedings. This Court held the statute unconstitutional because it imposed an invidious discrimination between an American citizen of Japanese ancestry and an American citizen of non-Japanese ancestry—e.g., northern European extraction. The statute imposes upon the American citizen of Japanese extraction an onerous burden of proof to show that the payment by the father for the land conveyed to the citizen was not done with the purpose of evading the statute; failure to sustain the burden results in escheat. A similar conveyance to an American citizen of non-Japanese extraction would require no proof whatsoever and no risk of escheat.

There is just no similarity between *Oyama* and the instant case. The California alien land law does not deal with different types of activity. Instead it attaches vastly different consequences to the same act, based upon happenstance of racial origin of the actor. While differences in status may justify different consequences in appropriate cases—e.g., different maximum hours of work for women as against men—the state in *Oyama* seized upon a difference in the racial origin of its citizens to achieve a rank discrimination, and not any purpose within the competence of its police power. Act 201 does no such thing. It creates no invidious discrimination between classes of people performing the same activity. Act 201 applies to adults and minors, white and colored, citizen and non-citizen alike. The different consequences flow from different

activities and are reasonably related to objectives which the state has the constitutional authority to promote.

Morey v. *Doud,* 354 U.S. 457, 77 S. Ct. 1344, 1 L. ed. 2nd 1485 (1957), involved the validity of an Illinois statute which required firms selling or issuing money orders in the state to secure a license and to submit to state regulation. The statute, however, exempted the American Express Company from such requirements. This Court held that this statute created an invidious discrimination between the American Express Company and other companies with equal integrity and reputation. Again, the statute drew a distinction based upon status only to create discrimination and not to achieve any objective within the state's police power.

Petitioner seems to imply (Br. 18) that Act 201 is unconstitutional for the further reason that it is a drastic change from the common law, at least so far as minor children are concerned. Even assuming that Petitioner's premise is correct,[11] no constitutional infirmity attaches to Act 201. The state legislatures are not required to adhere to the common law nor are they precluded from reverting to the stringent requirements of the common law. This Court has had no difficulty in sustaining the validity of statutes abolishing causes of action for injuries occurring on the land of railroads unless negligence or wanton or wilful misconduct is shown. Such statutes have been upheld even as against minor children of the ages of five and seven, respectively. *Erie R. Co.* v. *Duplak,* 286 U.S.

[11] When Act 201 was enacted in 1953, the Michigan common law duty of a landlord to trespassers was the same for minors as for adults. In many types of cases, this meant that there was no duty of any kind owed. See *Lyshak* v. *City of Detroit, supra.*

440, 52 S. Ct. 610, 76 L. ed. 1214 (1932); *Erie R. Co.* v. *Hilt,* 247 U.S. 97, 38 S. Ct. 435, 62 L. ed. 1003 (1918). Similarly, automobile guests statutes have been sustained which preclude recovery by a non-paying guest in an automobile except upon a showing of recklessness. *Silver* v. *Silver, supra.*

Act 201 is a reasonable exercise of the state police power. It makes a reasonable distinction between different kinds of activities and attaches differing consequences to each. It involves no invidious discrimination. It is plainly constitutional.

B.

The Procedure Followed by the Michigan Supreme Court Was Consistent With Due Process of Law

Petitioner's principal argument (Br. 9-17) is that he was denied his day in court by being prevented from addressing himself to Act 201. He argues that this is a *Saunders* v. *Shaw* situation requiring a reversal of the Michigan Supreme Court judgment.

There is no basis in the record for Petitioner's contention. At the outset, it should be pointed out that Petitioner is somehow trying to create the impression that he was the victim of duplicitous conduct on the part of the Respondent as to which he was defenseless. He attempts to create the impression that Respondent had in its possession information that was available only to Respondent, and that Respondent intentionally or negligently failed to call this information to the attention of the trial court or of the Petitioner and waited to do so until the proceedings arrived in the Michigan Supreme Court. Nothing could be further from the truth. The Act contained provisions which were obviously beneficial to Respondent. No advantage

could possibly accrue to Respondent by concealing the statute if its counsel had been aware of its existence. Respondent's counsel knew that by raising the statute for the first time in the Michigan Supreme Court a very substantial risk would be involved that that Court might refuse to consider the Act. There was, therefore, no incentive for Respondent to withhold disclosure of Act 201 until the case came to the Michigan Supreme Court.

The fact is that at the time Petitioner filed his complaints in the Michigan Circuit Court, Act 201 was already on the books in Michigan. The statute was enacted in 1953 and should have been as well known to Petitioner as to Respondent. Nothing in Respondent's conduct in any way precluded Petitioner from knowing about the existence of the statute.

It was Petitioner's responsibility to plead and prove his case according to Michigan law.[12] Act 201 is an integral part of the Michigan law. Petitioner, in his complaints, specifically set forth that James and David Heider and their dog "set out muskrat trapping" (R. 4, 33); that the children were on Respondent's premises with its express or implied consent or they were licensees and invitees on the premises (*ibid.*); no allegation, however, was made in the complaint that any compensation had been paid to Respondent, or any

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[12] It should be noted that Petitioner's substantive contentions before the state court were based entirely on state substantive law. Thus, this situation is unlike those where a claim is presented to a state court under federal law and the state court disposes of the claim on the basis of some state procedural ground. In such cases, the Supreme Court has exercised some supervisory responsibility in reviewing the state procedural ground since the procedural ground has obstructed the claim to the federal right. See Hill, "The Inadequate State Ground", 65 Colum. L. Rev. 943 (1965).

one else, for the Heider boys' activities on Respondent's land. The complaint further stated that Respondent knew that persons utilized its land for the purposes of hunting, fishing, trapping and other purposes, and that in the course of "ordinary care" it should have known that part of the pond area froze and part did not and that the chemical discharge into the pond gave the appearance of ice, so that people could walk on the pond thinking the entire pond was frozen and could drown (R. 2-3, 32-33).

At this stage of the proceeding, if Respondent had been aware of Act 201, it could have filed a motion to dismiss the complaint on the basis that the allegations in the complaint showed that the activities involved therein were covered by Act 201 and that plaintiff did not plead a cause of action because he failed to allege that compensation had been paid or that the deaths were the result of gross negligence or the wilful and wanton misconduct of Respondent. See *In re Del-Monte's Estate,* 340 Mich. 165, 65 N.W. 2d 309 (1954); *Michaelson* v. *Simula,* 264 Mich. 457, 250 N.W. 264 (1933); *Naudzius* v. *Lahr,* 253 Mich. 216, 234 N.W. 581 (1931). A reading of the opinions in the Michigan Supreme Court shows that under Michigan law, such a motion would have to be granted and the complaint ordered be dismissed. No constitutional question would have been involved under this set of circumstances, since it is a matter of state law and not federal law whether a complaint states a cause of action under state law.

Petitioner, however, seems to argue (Br. 11-12) that because the dismissal for failure to state a cause of action was by the State Supreme Court, he was deprived of a hearing on the factual question of whether

the boys were trapping within the meaning of the statute. The claim has no support in the record. The applicability of Act 201 was directly in issue before the Michigan Supreme Court. The Michigan Supreme Court could reasonably have anticipated that any available claim that the statute did not apply because of the facts would have been made then. But Petitioner made no such claim. He did not contend before the Michigan Supreme Court that the boys were not trapping or that compensation had been paid or that Respondent had been guilty of gross negligence or wilful and wanton misconduct. Nor did he indicate to the Michigan Supreme Court that he had any evidence different from that which he had offered during the trial. With no contention before it that other facts existed which would have a bearing on the subject matter, or that any new hearing would be useful, or even any motion for leave to amend the pleadings[13] we submit that the Michigan Supreme Court could reasonably rely on the pleadings[14] and on the record before it in determining whether the statute was to be applied.

The record was replete with references to the fact that the boys were trapping. Not only was this set out in the complaints, but throughout the pretrial proceedings and the trial similar statements were made. When the case was called for pretrial, the Court requested counsel for Petitioner to state what the case was about. Counsel responded (R. 13):

> "The two boys were brothers, James and David. On December 21, 1958 it was about 12 degrees

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[13] Petitioner has never sought leave to amend his pleadings despite his claim (Br. 11) that somehow he has been deprived of that opportunity.

[14] *Cashaw* v. *Great Lakes Greyhound Lines, Inc.*, 331 Mich. 291, 49 N. W. 2d 183 (1951).

below zero *and they were muskrat hunting, they had some traps with them and they went onto some ponds that are maintained by the defendant.* The ponds are places where the defendant dumps its waste or by-products from potatoes, which has got some chemicals in it. The ponds were frozen except right in the area where the waste material comes into the pond". (Emphasis added)

Respondent did not put these words into Petitioner's mouth. They were the words of Petitioner's counsel. He was telling the Court the facts in the case as known to Petitioner and his counsel. The statement is clear and unequivocal—the boys were muskrat hunting, they had some traps with them, and they went onto the pond maintained by the Respondent.

When the case was called for trial, Petitioner made an opening statement to the jury as to what he expected to prove. He there said (R. 55-56):

"Now, what happened in this particular case is that David Heider was 8 years of age at this time, it was on December 21, 1958. He with his brother James, we call him Jimmy, he was 11 years old, they had been for quite a period of time setting traps out near Sebewaing in various parts of the community.

Now, on this particular day it was exceedingly cold, it was 12 degrees below zero or approximately thereabouts, and these two boys went out on a Sunday afternoon, about 3 o'clock to set their traps. They were hunting for, trapping for I believe it was the muskrat, something to sell, to make a little money.

* * * * * *

On this Sunday the 8 year old went over to the home of his brother, it is really I suppose his half

brother, he went over to his brother's house and they got some traps and they set out to trap. As I told you, they never came back at 5 o'clock".

At the trial itself, plaintiff called witnesses to prove the essential elements of his case. One of the first witnesses was the boys' grandfather, at whose home David Heider lived. The following questions and answers are from the direct examination of this witness by Petitioner's counsel (R. 64-65):

"Q. And tell us what happened the first part of the afternoon in relation to the boys going trapping?

A. Well, Jim and David, they left about 3:30 on the—

Q. Did, and from whose house did they leave?

A. They left from my place.

Q. From your place?

A. Yes.

Q. In other words, David came over to your house?

A. That's right.

Q. And Jim and David left together?

A. That's right.

Q. Now about what time did they leave your house?

A. About 3:30 in the afternoon.

Q. And what did they have with them, how were they dressed, describe it?

A. Well, they had on winter clothes and they had traps and a bicycle.

* * * * * *

Q. Did they leave your house together?

A. Yes.

Q. And when they left, they had what with them?

A. Their bicycle and traps."

Testimony was also adduced from James' mother (David's stepmother). On direct examination, she testified (R. 171-173) that she knew that James was trapping and that on December 21, 1958, when David came over to the house, he and James started out to trap. She game them permission provided they were back by 5 o'clock. When the boys did not show up, she went looking for them because she knew where they had placed their traps. She found one of the traps and actually found a muskrat in it. She put the muskrat in the car, and continued to look for the boys.

Petitioner called as a witness one of the persons who had helped recover the boys' bodies from the pond. This witness testified (R. 134) that when the bodies were found, three or four traps were also hooked out from the water where the bodies were.

No evidence was introduced that any compensation had been paid to Respondent in connection with the trapping activities of the Heider boys.

The trial judge, who acted as the trier of facts in the James Heider case, found (R. 19):

> "The facts in the two cases were comparatively clear and uncontroverted. On the afternoon of December 21, 1958, 12 year old James Heider and his 8 year old half brother, David Heider, received permission from their family to take their bicycle and their cocker spaniel to set out muskrat traps in the vicinity of their homes at Sebewaing, Michigan. When they did not return at the expected time, their grandparents went out to look for them but without success. Later a search party discovered the bodies of the boys and their dog at the bottom of a pond on defendant's premises. This pond was a considerable distance inside defendant's property and was used to store water

> from defendant's sugar manufacturing plant until some time in the spring when the State permitted it to be released into the Saginaw Bay. Although none of defendant's employees was shown to have specific knowledge that children trespassed upon defendant's premises to trap, they knew that trespassers came upon defendant's land during the hunting and trapping seasons and that traps were set at the ponds to catch muskrats which frequented them and actually did considerable damage to company property by digging holes in defendant's dikes. Defendant company put up 'no trespassing' signs at least twice a year but knew they did not remain in place and often were ignored."

Thus, from the point of view of the Michigan Supreme Court, the record before it, together with the statements of counsel in the briefs submitted to it,[15] gave no indication of any ambiguity or dispute as to the facts. Petitioner was on notice when he argued his case before the Michigan Supreme Court that the Court could take Act 201 into account and on the basis of that Act, could reverse the judgment either with or without a new trial. He argued that the Court should not consider Act 201, but he gave the Court no indication that the record was in any way deficient or that he could adduce additional evidence having a bearing on the issues in the case. The Michigan Supreme Court rendered its opinion only after Petitioner had been apprised of the issues and had been given a com-

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[15] Petitioner in his Brief before the Michigan Supreme Court which was filed after Respondent in its Brief had urged that Court to consider Act 201 began his statement of the facts as follows (p. 1): "On December 21, 1958, James Heider, age 12, and David Heider, age 8½, and their cocker spaniel drowned while trapping for muskrats and minks on the defendant's property."

plete opportunity to present his views on the issues. Petitioner had his full day in Court.

Petitioner filed an Application for Rehearing in the Michigan Supreme Court. Here for the first time he attempted to assert federal constitutional rights. He also referred to the unfairness in not permitting him to amend his complaint—even though he has never requested permission to do so. The Michigan Supreme Court denied the Application without opinion. No constitutional issue is presented when the state court refuses a request to amend a complaint or when a party seeks a new remedy where by his own conduct he misconceived his appropriate remedy. See *Carr* v. *Nichols,* 157 U.S. 370, 15 S. Ct. 640, 39 L. ed. 736 (1895); *American Surety Co.* v. *Baldwin, supra.*

This is an entirely different situation from that which obtained in *Saunders* v. *Shaw, supra,* relied upon so heavily by Petitioner. That case involved a suit for injunction against the collection of a drainage tax. When the case was tried in the Louisiana trial court, plaintiff had offered evidence to show that the tax was improper since the land taxed was outside the levee system that the drainage commissioners were building and hence would receive no benefit. The defendant objected to the evidence as inadmissible under the pleadings and the objection was sustained. However, the evidence was spread upon the record in order to carry the case to the state Supreme Court. Judgment was for the defendant, and it was affirmed by the Louisiana Supreme Court. Upon Petition for Rehearing, however, the Louisiana Supreme Court held that under a decision of the United States Supreme Court decided after the original decision evidence of lack of benefit was relevant. The Louisiana Supreme

Court concluded from the evidence of lack of benefit which had been spread on the original record that judgment should be for the plaintiff. Defendant then petitioned the Louisiana Supreme Court for a second rehearing. The Louisiana Supreme Court denied the petition under its rule that only one rehearing should be granted in a case.

There are four basic differences between *Saunders* and the instant case. First, in *Saunders,* the state Supreme Court decided a controverted factual issue without permitting a hearing. Here, the Michigan Supreme Court decided that no cause of action had been stated, a question of law. No contested issue of fact was before the Michigan Supreme Court.

Second, in *Saunders,* the state court found benefit in the absence of any statement by the defendant supporting such a finding whereas, in the instant case the record abounds with allegations in the pleadings and statements by Petitioner's attorney and witnesses that the boys were on the land to trap without having paid compensation therefor and that Respondent was not guilty of gross negligence or wanton and wilful misconduct. Thus, in *Saunders,* a finding of fact was made by the Louisiana Supreme Court on an issue as to which the defendant had not been heard. In the instant case Petitioner himself had admitted or established all the relevent facts.

Third, in *Saunders,* the defendant had taken all necessary procedural steps in his behalf. He stated an adequate defense which was sustained by the trial court in accordance with the then prevailing law. In the instant case, Petitioner never set forth a cause of action; he failed to plead a case properly within the meaning of an applicable statute which he overlooked.

Whereas in *Saunders,* defendant could properly rely on the court sustaining his objection to evidence of benefit, here Petitioner can point to no act of the state courts or anyone else as the reason for his failure to note the statute or to plead a cause of action in accordance with that statute.

Finally, and most important, unlike *Saunders,* the change of decision by the Michigan Supreme Court is not based on a decision of the United States Supreme Court handed down after the trial and, in fact, after the State Supreme Court had originally spoken. It is based on a statute enacted long before the trial and on an interpretation of that statute which could have been foreseen by anyone familiar with the statute.

These distinctions between *Saunders* v. *Shaw* and the instant case are illustrated by the rationale of *Brinkerhoff-Farris Trust and Savings Co.* v. *Hill,* 281 U.S. 673, 50 S. Ct. 451, 74 L. ed. 1107 (1930),[16] a suit in a Missouri State Court to enjoin the collection of taxes. Plaintiff maintained that the tax was unconstitutional, a denial of equal protection of law because the assessor had intentionally and systematically discriminated against persons in Plaintiff's position by assessing its property at full value while intentionally and systematically assessing other property at only seventy-five percent of its value. Judgment was against the taxpayer. On appeal to the Missouri Supreme Court, the judgment was affirmed on the ground that Plaintiff had failed to exhaust its administrative remedies by seeking relief before the State Tax Commission. However, the law of Missouri, as enunciated by the Missouri Supreme Court prior to *Brinkerhoff,*

[16] See also, *Butler Bros.* v. *McColgan,* 315 U. S. 501, 509-510, 62 S. Ct. 701, 705, 86 L. ed. 991, 997 (1942).

was that the State Tax Commission had no jurisdiction to consider claims such as those advanced by Plaintiff. The earlier case was overruled by the Missouri Supreme Court in *Brinkerhoff*. Plaintiff's Petition for a Rehearing in the Missouri Supreme Court was denied.

This Court held that while the Missouri Supreme Court had the right to overrule its earlier decision, Plaintiff could not reasonably have anticipated that overruling and could not reasonably have been expected to seek relief from the State Tax Commission. This Court held that Plaintiff in attempting to vindicate its constitutional rights could not be denied an opportunity to a hearing by being told that it was required to resort to a forum which the Missouri Court had previously expressly held was not available to it. The opinion, however, was careful to point out that this result was reached because the Missouri Supreme Court had previously rendered a construction of its statute to the effect that persons in the position of Plaintiff could not resort to the State Tax Commission. The opinion then added (281 U.S. at 681, footnote 9, 50 S. Ct. at 455, 74 L. ed. at 1114).

> "Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own."

The instant case falls squarely within the above quotation. Had Act 201 been enacted subsequent to the trial in this case, *Saunders* v. *Shaw* and *Brinkerhoff* would have required the Michigan Supreme Court to affirm the judgment if Act 201 were not retroactive or to remand for a new hearing if the Act were retro-

active. Or, if the Michigan Supreme Court had previously interpreted Act 201 and had held that no allegation of gross negligence and no allegation of compensation were required even where it was stated in the complaint that plaintiff had been trapping or hunting, *Saunders* and *Brinkerhoff* might have required a hearing. But neither is the case. Here, the statute had been enacted long before Petitioner's complaint was filed. And there was no Michigan authority on which plaintiff could rely for its failure to plead as the Michigan Supreme Court required. Consequently, Petitioner had full opportunity to be aware of Act 201 and had to assume the risk that the interpretation of the Michigan Supreme Court as to the requirements of pleading under the statute would differ from its own.

CONCLUSION

Respondent submits that the writ of certiorari should be dismissed or the judgment of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX A

BRIEFS BEFORE THE MICHIGAN SUPREME COURT WITH RESPECT TO ACT 201

Brief of Michigan Sugar Company

X.

THE EXISTENCE OF ACT 201, PUBLIC ACTS OF 1953, PAGE 281 (1948 C.L. 300.201; M.S.A. 13.1485) REQUIRES THIS COURT TO REVERSE THE TRIAL COURT WITH OR WITHOUT A NEW TRIAL, EVEN THOUGH IT WAS NOT BROUGHT TO THE ATTENTION OF THE TRIAL JUDGE.

The statute in question reads as follows:

> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other valuable consideration for the purpose of hunting, fishing or trapping, with or without permission, against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

Candor compels our admission that this statute escaped the attention of this brief writer until it was noted in the December 8, 1962 publication of the Negligence Law Section Bulletin of the State Bar of Michigan. It is cited nowhere in the Michigan Reports. We think the force of the enactment is to deprive the plaintiff of any cause of action under the proofs in this case. It is not a matter of affirmative defense nor of limitation. Its language is to abolish any such cause of action. It has no limitation. The cause of action no longer exists. It applies to "any person". The Statute in question expresses the public policy of the State. It places the law with reference to trespassing hunters, fishermen and trappers, including minors, where it was prior to the more recent adjudications dealing with tres-

passing children and beginning with *Lyshak* v. *City of Detroit*, 351 Mich. 230.

The first question that presents itself is:

> CAN THE DEFENDANT RAISE THE QUESTION AND CAN THE COURT CONSIDER IT ON APPEAL SINCE COURT AND COUNSEL WERE UNAWARE OF IT AND IT WAS NOT CONSIDERED IN THE TRIAL COURT?

We think it can be. Simple justice directs that it should be.

While the general rule is that "when a cause is brought up for appellate review, a party cannot assume an attitude inconsistent with or different from that taken by him at the trial and is restricted to the theory on which the cause was prosecuted or defended in the Court below." *4 C.J.S.*, (Appeal and Error, Sec. 241), there is an exception to the general rule which is as well recognized as the rule itself which is discussed in *4 C.J.S.* 7451 (Appeal and Error, Sec. 242). It is there said:

> "Certain limitations and exceptions to the general rule that questions not raised below will not be considered on appeal have been recognized by the Courts. Whether an appellate court should review the question raised in it for the first time depends on the facts and circumstances disclosed by the particular record or case. As the rule is for the purpose of orderly administration and the obtainment of justice, whether or not the Court will follow it is ordinarily a question of administration. Where the consideration of a claim sought to be raised for the first time on appeal is necessary to a proper determination of the case, or the record shows that certain facts existed that were necessarily decisive of the action or where the determination of a question would be decisive of the entire

controversy on its merits, such matters may be considered although first raised on appeal.

"The failure to present the Trial Court that of which it is charged with judicial knowledge does not preclude its consideration for the first time on appeal, and a question which affects the right of recovery or right to maintain an action may be raised for the first time on appeal. Even though overlooked in the Trial Court, a pertinent statute or constitutional provision may be considered and legal defenses based on public statutes may be first raised on appeal."

Among the cases cited in support of the exception to the rule is *Morris* v. *Radley,* 306 Mich. 689. A judgment had been entered in the Trial Court against Radley and the Oceana County Road Commission. The plea of governmental immunity had not been interposed in the Trial Court because the defense of governmental immunity was not then available under the judicial decisions of the State of Michigan. Subsequently it was held that a plea of governmental immunity was available. A motion for a new trial had been filed in the court and was denied by the Trial Judge because the case was then pending on appeal. The opinion goes on to say:

"Counsel for defendants now ask this Court to consider the matter and allow the County Road Commission to interpose the defense in order to prevent a miscarriage of justice. We concede this should be allowed. The judgment against the defendant County Road Commission in fairness should be set aside notwithstanding the failure of the defendants to raise the defense at the trial due to the circumstances related. In a recent case, *People* v. *Holmes,* 292 Mich. 212, we said:

'It is axiomatic that an objection not properly and timely presented to the court below will be

ignored on review and, except under unusual circumstances, we have no disposition to relax this rule. Nevertheless, in the exercise of supervisory control over all litigation, appellate courts have long asserted the right to consider manifest and serious errors although objection was not made by the party who appeals. As stated in *Gonzales* v. *Rivera*, 37 N. M. 562, 567 (25 P. (2d) 802):

> ' "Ordinarily, this court is content to examine the points here relied upon for reversal, if properly preserved at the trial, sustaining or overruling them. That is all appellants are entitled to as of right. But that does not limit the inherent power of this court to prevent fundamental injustice." '"

The opinion further goes on to state:

> "This court may exercise any of the powers of amendment of the court below and make any order, or grant such relief, as the case may require. Court Rule No. 72 (1933). We would be remiss in doing justice, were we to allow the judgment against the county road commission to stand, while we have jurisdiction over the case on appeal."

In *State* v. *Pacific Waxed Paper Company*, 157 P. (2d) 707; 22 Wash. (2d) 844; 159 A.L.R. 297, it is said:

> "We have held many times that questions not raised in the court below will not be considered on appeal. We do not wish to depart from that rule, but it has its limitations. If the question is one that upon its answer depends whether the complaint states a cause of action and the complaint cannot be amended, then it may be raised at any time. *Fick* v. *Jones*, 185 Wash. 365; 55 P. (2d) 334."

In *Holzer* v. *Rhodes*, 163 P. (2d) 811; 24 Wash. (2d) 184, it is said (813):

> "Ordinarily we would not consider that type of question at this time because we have considered many times that questions not raised in the court below will not be considered on appeal. This rule does not apply when the question raised affects the right to maintain the action."

In *Adley Express Company* v. *Town and Darien*, 7 A. (2d) 446; 125 Conn. 501, it was said:

> "Ordinarily questions not raised at the trial will not be considered on appeal. An exception is made when a pertinent statute has been overlooked."

In *Bedenbaugh* v. *Adams* (Fla. 1956) 88 So. (2d) 765, the Supreme Court in disposing of the matter similar to the one at bar said:

> "Apparently the parties in the Trial Court and in this Court have overlooked the provision of Section 585.15 and the provision of Section 585.16 F.S.A."

and then went on to say:

> "As stated above and in fairness to the Chancellor, it is apparent that the statutes on which this decision has been determined were evidently not brought to his attention by the parties below. Nonetheless, they are the law of the State and appear to control the matter before us. We have no alternative but to follow them."

In *Yannuzzi* v. *United States Casualty Co.*, 115 A. (2d) 557; 19 N.J. 201, which was a case involving an insurance

policy, the Court had this to say about recognizing a State statute:

> "The legislature expressly provided that every policy should be deemed to include a provision that notice by the assured to any authorized agent of the insurer within this State shall constitute notice to the insurer. We unhesitatingly reject the defendant's contion that this provision, although phrased very comprehensively, is applicable only to cases where the assured has become insolvent or bankrupt; the statute's reference to the continued liability of the insurer, notwithstanding the assured's insolvency or bankruptcy, is an independent one and does not limit the scope of the clear provision relating to notice to the insurer's agent. We likewise reject the defendant's intention that we should not take cognizance of the statute because (though fairly briefed and argued before us) it had not earlier been brought to the attention of the lower courts. The doctrine that courts will ordinarily decline to consider matters not raised below (*Roberts Electric, Inc.* v. *Foundations and Excavations, Inc.*, 5 N.J. 426, 429; 75 A. (2d) 858 (1950)) has little application where, as here, we are confronted with a legislative enactment which embodies a public policy of our state which this Court may justly enforce between the parties."

See *Mitchell* v. *Allison*, 213 P. (2d) 231, in which the Supreme Court of New Mexico (1949) said:

> "Notwithstanding Rule 20, the Supreme Court, in the interest of justice, has not limited to jurisdictional questions those that can be first ruled on in the Supreme Court. In *Candelaria* v. *Gutieriez*, 30 N.M. 195, 230 P. 436, it was said there were three exceptions to the general rule, to-wit: (1) Jurisdictional questions; (2) Questions of a general public nature affecting the

State at large; and (3) Questions affecting the fundamental rights of the parties."

Megarry Bros. v. *City of St. Thomas,* 66 N.W. (2d) 704, (N.D. 1954) where it is stated:

"Ordinarily, questions not raised at the time of trial will not be considered on appeal but to that rule there are certain exceptions. Where a pertinent statute has been overlooked resulting in claimed error that is of public concern, this Court will consider the error, though it be not brought to our attention by either of the parties."

In *Rubens* v. *Costello,* 251 P. (2d) 306; 75 Ariz. 5, it was said:

"The record in this case shows certain facts to exist that are necessarily decisive of the action which do not fall within the assignments of error, nor the theories upon which the case was tried below. The briefs on appeal follow the theory on trial. As we held in *Munger* v. *Boardman,* 53 Ariz. 271; 88 P. (2d) 536, and *International Life Insurance Co.* v. *Sorteberg,* 70 Ariz. 92; 216 P. (2d) 702, 706; when the record in a case on appeal shows affirmatively that cetrain facts exist sufficient to determine an issue, which though not specifically presented and tried out in the lower Court is necessarily decisive of the action, we will consider and determine the appeal upon that issue notwithstanding it was never formally raised or litigated in the lower Court. *International Life Insurance Co.* v. *Sorteberg, supra.*

"It is the general rule that an appellate court will not consider the question not first raised in the lower court but this court said in the case of *Town of South Tucson* v. *Board of Supervisors,* 52 Ariz. 575; 84 P. (2d) 581, 584, this is merely a rule of procedure and not a matter of jurisdiction. * * * One of the exceptions to the rule is questions of a general public nature

affecting the interests of the state at large and this is particularly true when the question raised for the first time is one of substantive law which is not affected by any dispute as to the facts of the case, for under such circumstances the parties may present the issue as thoroughly in the appellate court as it could have been presented below, without injury to either one. *Town of South Tucson* v. *Board of Supervisors, supra.*"

The Court further went on to say:

"Another exception to the rule is that: * * * a legal principle, although not suggested by either party at the trial (and we include on appeal) should be adopted in order to finally dispose of a cause on appeal if this impels the speedy enforcement of a right, or redress of a wrong, and, as a correct exposition of the law, is appropriate to the facts involved."

See *LePire* v. *Workmen's Compensation Bureau,* 111 N.W. (2d) 355 (S. Ct. N.D. 1961). It was there held that where a pertinent statute had been overlooked by both counsel and the court resulting in claimed error in a matter that was of public concern, the Court would consider the error even though it was not brought to the attention of the Court by either of the parties. Citing *Megarry Bros.* v. *City of Saint Thomas,* (N.D. 1954) 66 N.W. (2d) 704.

It is said in *5 Amer. Jur.* (2d) 33 (Appeal and Error, Sec. 548):

"The general rule has also been denied application where the question raised first on appeal relates to the foundation of the rights of the parties, as where the effect of the application of the rule would be to make the rights of the parties depend upon a statute which the court is judicially bound to know does not govern the case."

Citing *Huntress* v. *Huntress' Estate,* (CA 7 Ill.) 235 F. (2d) 205, 61 ALR (2d) 682. In that case it was said:

> "It has been suggested that since the point was not raised in the Trial Court that a remedy exists under Rule 18(b) and Section 1655 and neither the rule nor the statute were called to the attention of the District Court, this Court should not invoke them. However, we are of the opinion that that fact does not prevent us from noticing and applying the pertinent rule and statute. Thus, the Supreme Court has said that an appellate Court reviews judgments, not statements in opinions. *Black* v. *Cutter Laboratories,* 76 S. Ct. 824. The party's failure to call the Trial Court's attention to a relevant statute does not preclude the appellate Court from considering it. *Federal Deposit Insurance Corporation* v. *Vest,* (6th Cir.), 122 F(2d) 765, certiorari denied 314 U.S. 696; 62 S. Ct. 414; 86 L. Ed. 557. A Court of review may consider and construe a statute determinative of the case which was not specifically called to the attention of the Trial Court." (Citing cases.)

See *Smith* v. *Pasqualetto,* 246 F. (2d) 765 (U.S.C.A. 1st Cir. Mass.), where the Court said:

> "Certainly, a Federal Court may on its own initiative take notice of relevant rules of state law."

Although no mention of this is made in the pleadings, their comment in the case (767) is particularly comforting to this brief writer. It is there said:

> "However, occasionally, as here, an applicable rule of law eludes not only counsel, but also since omniscience can hardly be expected, of the trial judge."

Palo Blanco Fruit Co. v. *Palo Alto Orchards Co.,* 195 F. (2d) 90 (U.S.C.A. 1st Cir. Mass.).

A case which we consider persuasive in support of our position is that of *Leary* v. *Citizens and Manufacturers National Bank*, 23 A. (2d) 863 (Conn. 1942). This is a case in which the appellate Court reviewed the decision of the trial Court granting judgment on a promissory note. In that case a statute was not pleaded nor considered by the Court below. The Court cites a provision of the Connecticut practice providing:

> "Errors considered—This Court shall not be bound to consider any errors on an appeal unless they are specifically assigned and unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the Court adversely to the appellant's claim or that it arose subsequent to the trial."

The Court stated, however, that:

> "T. se do not, however, preclude this Court from considering questions of law which were not raised before the Trial Court. While we are not 'bound to consider' such claims of error and do not ordinarily do so, we have upon occasion considered a question which was not so raised not by reason of the appellant's right to have it determined but because, in our opinion, in the interest of public welfare or of justice between individuals it ought to be done. * * * Accordingly, we have followed this course where the error was manifest. (*Riggs* v. *Zaleski*, 44 Conn. 120); where an applicable statute was overlooked (*Cunningham* v. *Cunningham*, 72 Conn. 157, 160; 44 Atl. 41; *Schmidt* v. *Manchester*, 92 Conn. 551, 555; 103 Atl. 654; *Stevens* v. *Nelagon*, 116 Conn. 307, 311; 164 Atl. 661; *Adley Express Co., Inc.* v. *Darien*, 125 Conn. 501, 504; 7 A. (2d) 446) and where the error went to a vital issue in the case. *Fairfield* v. *Newtowns*, 75 Conn. 515, 518; 54 Atl. 301; *Wickes* v. *Knorr*, 113 Conn. 449, 456; 155 Atl. 816;

G. & H. Investment Co. v. *Raymond,* 113 Conn. 778, 779; 155 Atl. 497."

Our Michigan Supreme Court on other occasions has spoken of its inherent powers and of its rights under Michigan Court Rule No. 72 to:

> (g) "Give any judgment and make any order which ought to have been given or made and to make such other and further orders and grant such relief whether mentioned in the notice of appeal or not as the case may require."

It has announced its "exclusive powers" as being outside the legislative province. *St. John* v. *Nichols,* 331 Mich. 148, 158 where it was announced that "this Court possesses inherent power however to order a new trial whenever it deems that the end of justice so requires." It said the same thing in *Weller* v. *Mancha,* 353 Mich. 189, 195. It granted a new trial unasked for in *Bahr* v. *Miller Bros. Creamery,* 365 Mich. 416, 428. It is interesting to note that in that case also a $40,000 verdict was rendered and it was argued that a remittitur down to the figure of $30,290 should be directed; that the Court found the figure "so excessive when compared to the proof of actual damage in the appellant's record as to suggest that some obvious element of mistake or prejudice into the jury's calculations." We cannot forbear a quotation from a member of this Court in *Montgomery* v. *Stephan,* 359 Mich. 33, 38, which said:

> "Our oath is to do justice, not to perpetuate error."

We respectfully urge therefore, in view of the foregoing authorities, that this Court has power to do so and that justice requires that the verdict and judgment be reversed with or without a new trial even though the statute was not considered in the Court below.

Brief of Heider

X.

THE EXISTENCE OF ACT 201, PUBLIC ACTS OF 1953, PAGE 281 (1948) C.L. 300.201; M.S.A. 13.1485) DOES NOT REQUIRE THIS COURT TO REVERSE THE TRIAL COURT WITH OR WITHOUT A NEW TRIAL, EVEN THOUGH IT WAS NOT BROUGHT TO THE ATTENTION OF THE TRIAL JUDGE.

The defendant appellant very candidly admits never having raised this defense in his pleadings, at trial, his motion for new trial or his reasons and grounds for appeal; it is only in his brief on appeal that he asks this Court for aid and assistance. Therein he cites the rule rightfully that not having raised the question of the Statute previously, he is precluded from raising it now. *Wardle* v. *Cummings,* 86 M 395; *Ketchell* v. *Keene,* 171 M 108; *Willok* v. *Townsend,* 245 M 632; *Rodal* v. *Crawford,* 272 M 99; *Kellom* v. *City of Ecorse,* 329 M 303.

But, says the defendant, the statute is a complete bar to plaintiff's lawsuit without reference to the defense being raised. The theory of the defendant is that the Statute is not a matter of affirmative defense. If it is not an affirmative defense, what kind is it? Can it be raised as part of the general issues? Can it arise by itself without notice to anyone — the plaintiff, the defendant or the trial court? Your plaintiff contends that this defense comes under Court Rule 23 Section 3, wherein affirmative matters seeking to defeat the cause of action set forth in the declaration take the opposite party by surprise must be plainly set forth in the answer.

But the defendant also claims that not having brought forth his defense, the Supreme Court can and should on its own volition use the defense of the Statute in question. As authority for his position he cites *Morris* v. *Radley,* 306 Mich. 689. In this case the Supreme Court did allow the insertion of a new defense of government immunity.

This was brought about by a new decision allowing this defense after the above cited case had been tried and an appeal taken. When the new decision appeared, the defendant moved for a new trial which had to be denied because the trial court had lost jurisdiction due to the appeal. The Supreme Court, therefore, said that since they had changed the law, the Defendant had the right to introduce the new issue of governmental immunity on appeal.

Defendant claims that since his defense is based on a statute that the trial court and the Supreme Court should take judicial notice of the statute. This position has been presented on other occasions to this Honorable Court and decided against the appellant. In *Shaver* v. *Associated Truck Lines,* 322 Mich. 323, the defendant tried to urge that plaintiff had violated a section of the motor vehicle law by carrying a passenger on his bike and that this was a contributing factor in his negligence. The Court said: "this claim was not raised in the pleadings, is not mentioned in the record and first appears in defendant's brief. It is now too late to inject this issue in the case." Other cases covering statutes are: *Hollister* v. *Kinyon's Estate,* 195 Mich. 261; *Selznick Enterprises* v. *Garson Productions,* 202 Mich. 106; *D & W Rottschafer Real Estate* v. *Morris,* 245 Mich. 192.

Forgetting the technical defects of defendant's position, let us examine the statute in regard to the rights of the minors. The defendant seemingly would accept liability had the minors entered into a voidable contract with the defendant by paying. Think of it, a 12 and an 8 year old entering into a contract so their estates could recover for their deaths. But going further, the statute cited is not the only one penalizing trespassers. Regardless of the statutes, Michigan has joined approximately forty other states in liberalizing recovery for trespassers, especially in the case of children.

Furthermore, plaintiff's declaration cited statutes wherein the defendant in their function as land owners and operators were negligent towards public safety.

In final analysis, the courts have come to the conclusion that the duty of care stands higher than the sanctity of land ownership. In the question based now before this Honorable Court, the matter of a few pieces of silver should not override the duties owed to the youngsters involved.

Heider Brief, Supplement to Argument No. 10

Here, the Defendant has attempted to claim that this statute applies to minors, and asks that instead of looking at the status symbol of trespassers, licensees and invitees, we look at the functional symbol of fishing, trapping or just plain trespassing. In *Lyshak* v. *City of Detroit,* 351 Mich. 230, this Court affirmed a $50,000.00 award for a loss of an eye for a child struck by a golf ball. If Lyshak had two friends with him, one with a fishing pole, one with a trap and all three trespassed on the city's golf course property, Lyshak to play in the water, his one friend to fish and the other one to trap, the Defendant claims there would be a different rule of liability for injuries or death of Lyshak and his two friends. This statute clearly does not apply. Moreover, if the Defendant instead of letting its fences decay, had properly maintained them, Lyshak would not have been on a golf course and the Heider children would not have been in the pond.

APPENDIX B

Ala. Code Ann., tit. 47, §§ 281 to 285 (Supp. 1965) (broad category of recreational users)

Cal. Civil Code § 846 (Supp. 1965) (broad category of recreational users)

Conn. Genl. Stats. § 26-16 (1958) (hunting, fishing and trapping)

Fla. Stats. Ann. § 375.251 (Supp. 1965) (broad category of recreational users)

Smith-Hurd Ill. Stats. Ann., ch. 70, §§ 31 to 37 (Supp. 1965) (broad category of recreational users)

Burns' Ind. Stats. Ann. §§ 11-1815 to 1817 (Supp. 1965) (broad category of recreational users)

Kan. Stats. Ann. §§ 58-3201 to 3207 (Supp. 1965) (broad category of recreational users)

Baldwin's Ky. Rev. Stats. Ann., pt. 2, S.B. 311 (Supp. 1966) (broadcategory of recreational users)

Me. Rev. Stats. Ann., tit. 12, §§ 3001 to 3005 (1964) (hunting, fishing, trapping, camping, hiking and sightseeing)

Md. Code Ann., art. 27, § 578 (1957) (Supp. 1965) (hunting)

Minn. Stats. Ann. §§ 87.01 to .05 (1964) (broad category of recreational users)

Mont. Rev. Codes Ann. §§ 67.808 to 809 (Supp. 1965) (broad category of recreational users)

Neb. Rev. Stats. §§ 37-1001 to 1008 (Supp. 1965) (broad category of recreational users)

Nev. Rev. Stats. § 41.510 (1965) (hunting, fishing, trapping, camping, hiking, and sightseeing)

N.H. Rev. Stats. Ann. § 212:34 (1964) (hunting, fishing, trapping, camping, hiking, and sightseeing)

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N.Y. Genl. Oblig. Law § 9-103 (Supp. 1965) (hunting, fishing, trapping, hiking, and dog training)

N.C. Genl. Stats. §§ 113-120.5 to .7 (Supp. 1965) (broad category of recreational users)

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Page's Ohio Rev. Code Ann. §§ 1533.18 to .181 (1964), as amended, § 1533.181 (Supp. 1965) (broad category of recreational users)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 48

DONALD HEIDER, *Petitioner*

v.

MICHIGAN SUGAR CO., *Respondent*

On Writ of Certiorari to
The Supreme Court of Michigan

NO. 388

JEANNE KING, *Petitioner*

v.

VICO INSURANCE CO. OF ST. LOUIS, *Respondent*

On Petition for Rehearing of Denial
Of Certiorari to the Louisiana Supreme Court

NO. 502

RUSSELL H. SITTON, ET UX., *Petitioners*

v.

AMERICAN TITLE CO. OF DALLAS, ET AL., *Respondents*

On Petition for a Writ of Certiorari to
The Court of Civil Appeals for the Fifth
Supreme Judicial District of Texas

MOTION FOR JOINT CONSIDERATION OF PETITIONS AND CAUSES AND BRIEF IN SUPPORT THEREOF

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On Petition for a Writ of Certiorari to
The Court of Civil Appeals for the Fifth
Supreme Judicial District of Texas

MOTION FOR JOINT CONSIDERATION OF PETITIONS AND CAUSES

Your Movants, Russell H. Sitton and wife, Barbara J. Sitton, being also the Petitioners in Case No. 502, aforesaid, do hereby move that the above styled cases, Nos. 48, 388 and 502, be jointly considered or formally consoli-

dated as the Court may deem most expeditious. In support thereof, Petitioners would show that the same involve common questions of fact and law arising under the Seventh and Fourteenth Amendments as more fully shown by the annexed brief.

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Supreme Court of the United States

OCTOBER TERM, 1966

NO. 48

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Supreme Judicial District of Texas

BRIEF IN SUPPORT OF MOTION FOR JOINT CONSIDERATION OF PETITIONS AND CAUSES

Your movants are the petitioners in Case No. 502. They submit that all three cases captioned above involve a common fact situation: that is, a jury verdict was returned for the plaintiff and later overturned by the court, either trial

or appellate, on evidentiary grounds without ordering a new trial. They further involve a common question of law: Is the clause against re-examination of jury verdicts contained in the Seventh Amendment applicable to the states by virtue of the Fourteenth? As set forth in the Sitton petition, the Supreme Court has never expressly ruled on the application of the clause against re-examination to the states.

The Heider Case

The decision in case number 48, *Heider v. Michigan Sugar Co.* is reported at 375 Mich. 490, 134 N.W.2d 637 (1965). An industrial concern owned a 200 acre tract at the outskirts of a small town. There is a 27 acre pond on this tract into which effluent from the plant is discharged. The action is to recover for the death of two small boys who drowned in the pond, apparently when they were walking on ice which gave way under their weight. The plaintiff contended that the pond would not freeze solid and that the ice was "rotten" even in the coldest weather because of the high concentration of industrial waste in the water, that this created a deceptive and dangerous condition, that children would frequently come around the pond and that the defendant failed to take reasonable precaution for the safety of known infant trespassers.

The dissenting opinion states "It was quite clear * * * that *an extremely deceptive and dangerous condition existed*" (134 N.W.2d 645), and the majority has no statement to the contrary. Three witnesses, two of them employees of the defendant, testified that it was common practice for people to hunt and trap on the defendant's land. There was also evidence that small footprints had been seen and the ponds had been used for skating.

The following special interrogatories were submitted to the jury:

(1) Did the company know or should it have known "that children were likely to trespass?"

(2) Did a condition exist as to which the company "knew, or should have known, involved an unreasonable risk of death to child trespassers?"

(3) Was the utility of maintaining the pond in this condition "slight as compared to the risk to child trespassers?"

The jury answered "yes" to each of these questions.

The Michigan Supreme Court stated the question as follows: "WAS THE VERDICT AND JUDGMENT IN EACH CASE AGAINST THE CLEAR PREPONDERANCE OF THE EVIDENCE AND CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?" (134 N.W.2d 638).

It proceeded to answer the question in the affirmative, set aside the verdict and award final judgment to the defendant. It distinguished other attractive nuisance cases by stating "awareness of the infant trespasser was a controlling feature" (134 N.W.2d 641).

The King Case

The opinion of the Louisiana Court of Appeal in case number 388, *King v. Vico Ins. Co.*, is reported at 182 So. 2d 135 (1966). The decision was upheld by the Louisiana Supreme Court in a terse ruling reported at 249 La. 111, 185 So.2d 220 (1966). The case is a personal injury action by the passenger in an automobile for the driver's negligence. It was brought directly against the driver's liability insurance carrier as permitted by Louisiana law. Apparently Louisiana has no automobile guest statute. If there is such a statute in Louisiana, neither the court nor the parties considered it applicable.

The insured driver was proceeding down a narrow street passing between two automobiles parked on each side. As they approached an intersection, a dog walked out into the street and went back. Then, as the car came to the street corner, the dog again "ran out in front" of the car and the driver stopped suddenly causing the plaintiff to be

thrown against the windshield sustaining head and neck injuries. The principal defensive contention was that the driver was " 'acting in a sudden emergency not of her own creation.' " (182 So.2d 135-136).

The case was submitted to a jury, apparently on a general charge; the jury being advised that if a sudden emergency arose and the driver acted as an ordinary and prudent person would act under the circumstances shown, it should find for the defendant; that if the accident was caused solely by circumstances beyond the driver's control, that it should find for the defendant; That if the driver could have timely warned the plaintiff and failed to do so, it should find for the plaintiff; and further that if the driver was proceeding at a rate of speed which was unreasonable considering the circumstances then existing, it should find for the plaintiff.

The jury did find for the plaintiff, thereby answering all these questions in the plaintiff's favor.

The Louisiana appellate court differed with the findings of the jury. It reversed, denied a new trial, and entered judgment against the plaintiff. The question of failure to warn was not discussed. Neither did the court discuss the exact proximity between the dog and the car. It stated "We *feel* that * * * Miss Ray instinctively did exactly what other normal persons * * * would have done" (182 So.2d 137) (our emphasis). Concerning excessive speed, the court pointed to the driver's testimony that she had just started up, was in low gear and was traveling not more than 5 miles an hour. It also pointed out that the windshield was not broken where the plaintiff's head struck it but was cracked into a " 'spider web effect,' " that the plaintiff's head was close to the windshield beforehand, and that the plaintiff did not think she was hurt until later on. It concluded "*We are convinced* that Miss Ray operated her car in a normal way." (182 So.2d 138) (our emphasis).

The Sitton Case

The decision of the Texas Court of Civil Appeals in case number 502, *Sitton v. American Title Co.*, is reported at 396 S.W.2d 899 (1965). The Texas Supreme Court refused to issue a writ of error, without opinion, in an unpublished ruling. The plaintiffs in this case brought action against a title company, a real estate broker, and the grantee in a deed executed by the plaintiffs asserting that the defendants had conspired together, misrepresented the transaction involved and had altered the deed by which plaintiffs had conveyed their G.I. home causing default and foreclosure of their G.I. loan, a substantial mortgage deficiency, impairment of their Veteran's benefits, loss of their valuable credit rating, numerous demands for payment which they could not meet and extensive emotional and physical distress resultant thereto.

The instrument was admittedly in the hands of the title company at the time of the alteration and the grantee admittedly "called someone" at the title company and "requested" a "substitution" of grantees (396 S.W.2d 902). The plaintiffs testified that they were assured by the real estate and title company personnel "that [grantee] Moorman would assume the debt" (396 S.W.2d 901). They further produced an agent of the Veteran's Administration who testified that he called on the parties to investigate the matter and "Moorman told me he had her [Mrs. Brown, the title company officer] do it and she told me she did it" (Testimony 403).

All of the numerous special interrogatories to the jury were returned in the plaintiffs' favor. The jury was asked if the deed was altered "pursuant to any conspiracy" defined as a "combination or agreement of two or more persons, by concerted action to accomplish an unlawful purpose" and its answer was "Yes" (Pleadings 150).

Nevertheless, a judgment *non obstante veredicto* was affirmed by the Texas Court of Civil Appeals. The court

stated it could not "find evidence that any two or more of them engaged in concerted action" (396 S.W.2d 903), that "*we think*" (our emphasis) that the plaintiffs' injuries did not " 'naturally flow' " from nor were they " 'directly or immediately caused' " by the alteration of the deed (396 S.W.2d 904), and that "there was no evidence of a conspiracy * * * or of alteration of the deed as a result of conspiracy" (396 S.W.2d 905). Replying to the contentions that the Seventh and Fourteenth Amendments prohibited the court from overriding a jury verdict supported by evidence of probative force, the court stated that it had been directed to "no specific evidence supporting any part of the verdict * * *. Our examination of the record discloses to us no such evidence and no such violation * * *" (396 S.W.2d 905). The court concluded by stating that plaintiffs had been given "every reasonable opportunity to make out a case" and "they failed to do so" (396 S.W.2d 906).

Common Questions Are Presented

The same basic situation is presented in each of the above cases. In each instance, the plaintiff won his case before a jury and lost it before the court. In each instance, the cases were lost not on questions of law but on questions of fact.[1] In each instance, the higher state court did not order a new trial but entered judgment against the plaintiff. In each instance the question is the applicability through the Fourteenth Amendment of the second clause of the Seventh declaring: "No fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

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[1] In **Heider**, it was further held that recovery was barred by the Michigan "free hunting" statute. The applicability of such statute has no bearing on the other two cases and we concern ourselves solely with the Court's rulings concerning the evidence. May we point out in passing that in invoking this statute on appeal for the first time, the respondent is not seeking merely to call the Court's attention to an additional statute or authority, but it is seeking to change the entire theory of the case after the evidence has been closed.

It is obvious that the Michigan Court considers itself free to follow a much lesser standard for re-weighing the evidence than this Court has insisted upon. The testimony that numerous people went on the company land, that small footprints had been seen and that the ponds had been used for skating served to present at least some evidence that the defendant knew or should have known "that children were likely to trespass." This is clearly not a case where "without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy." *Galloway v. United States*, 319 U.S. 372, 407 (dissenting opinion). The Court did not pretend to so hold. Instead, it presumed that it could constitutionally destroy a plaintiffs' verdict on the grounds that it "was against the clear preponderance and contrary to the great weight of the evidence" (134 N.W.2d 643). It is now well established that to employ such a test in the federal courts, even when litigating state-created rights,[2] or to employ such a test in the state courts, at least when litigating federally created rights,[3] is violative of the Seventh Amendment. Should the Constitution not have equal force and effect in all private litigation? Certiorari has been granted in the *Heider* case and it appears that the Supreme Court will undertake to answer this question.

The *King* case is primarily concerned with the inference taking function of the jury. The trial of causes concerns not only the determination of external physical facts but is concerned with the inferences and deductions which may be legitimately drawn therefrom. Certain questions, such as who struck the first blow in an assault case, or whether a signature is genuine in a forgery case, concern physical, external and directly observable phenomena. If the parties or their witnesses unequivocally testify to direct observa-

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[2] **Dick v. New York Life Ins. Co.**, 359 U.S. 437.

[3] **Lavender v. Kurn**, 327 U.S. 645.

tion, the only remaining question is credibility. On the other hand, matters such as foreseeability, proximate cause, intent, scienter and the like may never be observed directly but must be deduced. They are strictly matters of opinion.

In actual practice, the cleavage between the two types of fact finding is almost indistinguishable if not non-existent. There are often no witnesses to a particular physical fact and the existence or non-existence thereof must be deduced. *Heider* is an example; exactly how the boys fell into the pond will never be known. Consider also relative facts such as the speed of a vehicle. While subject to direct observation and the most precise measurement, speed must almost universally go into evidence by lay estimates that, even in complete honesty, can differ in the extreme. Even when there are direct witnesses to the most positive and readily observable facts such as which driver drove across the center stripe of a highway, it is only through the keenest use of the deductive powers that the trier of facts can determine who is telling the truth. Again, the credibility or uncredibility of a witness is a matter of deduction, strictly a matter of opinion.

There is little dispute in *King* over what happened and how it happened. All that remains are the ultimate questions: (1) Did the driver in stopping suddenly conduct herself as would a prudent person *under the same circumstances?* (2) Was the speed shown excessive *under the existing circumstances?*

Of course it is true that a person cannot be held to the same high standard of care when faced with a sudden emergency. It is equally true that human safety is a much higher consideration than the safety of animals. The federal question is who, judge or jury, should make the determination that the conduct of the defendant's insured was justified by the conditions presented? The federal rule fashioned by the Seventh Amendment is clear. The jury is the proper tribunal to find both the external and internal,

the deductive and the inductive facts. *Dick v. New York Life Ins. Co.*, 379 U.S. 437; Green, *Protection of Jury Trial in Diversity Cases*, 35 Tex.L.Rev. 768 (1967). It would appear that the Louisiana rule differs. Such is quite apparent from the Louisiana Supreme Court's ruling that there is no error "on the *facts found* by the Court of Appeal" (249 La. 111, 185 So.2d 220) (our emphasis).

The *Sitton* case presents yet another facet of the same problem. In conspiracy actions, it is almost universally necessary for the plaintiff to secure the bulk of his evidence from the enemy camp. When people enter conspiracies to unlawfully invade the rights of others, they are not apt to call in a witness. Nevertheless, the plaintiffs produced the strongest evidence we can conceive of in a case of this type. They introduced proof that the instrument was admittedly changed in the offices of the title company, a clear fiduciary; presented uncontrovertible evidence that grantee Moorman was the only person who could have furnished the spurious grantee, his own employee; offered evidence that the real estate broker was the middle man and go-between for the entire transaction, the only person in a position to bring pressure to bear upon the title company; and produced an unimpeachable witness to testify that two of the three participants admitted the entire affair and that the title company officer declared that "she was in the habit of doing that * * * when it was necessary" (Testimony 375).

The appellate court chose to close its eyes to much of this evidence, to gloss over the facts and to declare "there was no evidence of a conspiracy to alter the deed in question * * * our attention is directed to no specific evidence supporting any part of the verdict" (396 S.W.2d 905).

While the Texas court gives lip service to the proposition that the jury "are the exclusive judges of the facts proved, the truthfulness and credibility of the witnesses, and the weight to be given their testimony" (Pleadings 148), and recognizes that a case should not be taken from the jury

unless there is no room in the evidence for honest difference of opinion, it appears that the court does not truly consider itself bound by such rules and feels free to depart therefrom whenever it subjectively feels a disaffinity for the verdict reached. If the court has taken to itself the authority to depart from the established standards at will, is this not the equivalent of having no standards at all? The case presents the further question whether the Plaintiffs' failure to observe prudent man standards must be decided in the same manner as the Defendants' failure to so act; that is, by judge or jury.

Summary

The three cases present differing aspects of the same basic situation:

(1) The Michigan Court has expressly ennunciated a watered-down test of the evidence not in harmony with the re-examination clause.

(2) The Louisiana Court has expressly held that with respect to the ultimate inferential facts, it is not restricted from finding those facts directly contrary to the jury's findings.

(3) The Texas Court has expressly considered the application of the Seventh Amendment and has obviously decided that the Amendment does not require it to observe any particular standards or prevent it from departing from its own standards at will.

None of the three cases involves the first clause of the Seventh Amendment. In Michigan, Louisiana, Texas and virtually throughout the Union, the electorate of the individual states have chosen jury trial as the established method for determining private rights. Each of the cases involves the second clause of the Amendment prohibiting the re-examination of jury verdicts; a much more difficult question but an even more vital one because liberties are lost by encroachment ten times oftener than they are lost by direct invasion. Does not the *Sitton* case where the court

has undertaken to apply shifting standards, varying standards, or no standards at all directly violate the Fourteenth Amendment guaranty of an orderly trial in accordance with established procedure in a competent tribunal? We suggest that the record presents such question whether or not the court finds that the re-examination clause of the Seventh Amendment has any application in state court litigation.

Other than the F.E.L.A. cases, no decision concerning the application of the Seventh Amendment to state court litigation has been handed down in forty years. We find no decision ever expressly ruling on the power of state courts to overturn jury verdicts. Certiorari has been granted in *Heider*. To bring forward the *King* and *Sitton* cases and to consider the three cases jointly will give the court the greatest possible opportunity to consider the full ramifications of this vital problem. It is respectfully moved that the three causes be either jointly considered or formally consolidated as the court may deem most expeditious.

Respectfully submitted,

October 25, 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 48

HERBERT HEIDER, Administrator for the Estate of JAMES D. HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent,
and
HERBERT HEIDER, Administrator for the Estate of DAVID HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent.

REPLY BRIEF OF PETITIONER

I.

THE FEDERAL QUESTIONS WERE TIMELY RAISED

Petitioner Heider agrees with Respondent Michigan Sugar Company that it is settled that this Court will not consider a case on certiorari when the petitioner has failed

to raise the federal questions at the appropriate stage of the state court proceedings. Petitioner submits that he did raise the federal questions as timely as was reasonably possible under the circumstances, and that those questions are now properly before this Court.

Respondent offers *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932), as being "on all fours with the instant case". The only similarity which Petitioner perceives is that in each case the federal questions were raised for the first time in a petition for rehearing in the State Supreme Court, and the petition for rehearing was denied without opinion. The crucial distinction between the two cases is that the action complained of in *Baldwin* was the action of the trial court, while here in *Heider*, the action complained of is that of the State Supreme Court. Thus in *Baldwin* the petitioner had ample opportunity to raise the federal questions in the trial court and in the State Supreme Court prior to petitioning for rehearing. In this case Petitioner timely raised the federal questions in his petition for rehearing because he could not reasonably have anticipated that the Supreme Court of Michigan would act in an unconstitutional manner. One cannot seasonably claim violation of his constitutional rights until his rights have been violated.

Consider the circumstances present here. The cases had been pleaded by both parties and tried without any reference whatsoever to the statute, Act No. 201 of the Michigan Public Acts of 1953 (Comp. Laws Supp. 1956, §300.201, Mich. Stat. Ann. 13.1483). Judgments were entered for plaintiff. In moving for a new trial defendant made no reference to the statute. Defendant raised the statute, completely outside of the record on appeal, for the first time in its brief to the Michigan Supreme Court.

The statute was enacted in 1953. It had never been interpreted before by the Michigan Court in any case so far as Petitioner is aware. A very serious question was presented as to whether the Court would pay any attention at all to the statute since it had been raised for the first time on appeal. Respondent's counsel recognized this uncertainty (Brief of Respondent, p. 24). The parties briefed their respective positions as to whether the Supreme Court could entertain consideration of the statute. Three Justices of the Michigan Supreme Court, dissenting, declared that the rule that usually a question may not be raised for the first time on appeal to the Supreme Court "* * * has not received uniform treatment. * * *" They stated further (375 Mich. 490, at 517, 134 N.W. 2d 637, at 649):

> "* * * This is not a proper case to apply the exception. Only when the matter was presented to the trial judge and he refused to rule, or under the clearest of circumstances, where it is unquestioned that the entire matter is before this Court, should the exception prevail.
>
> "Such is not this case in which the question is first presented here as an afterthought and accorded cursory treatment and briefing. * * *"

Another serious question was presented as to the manner in which the Michigan Court would interpret the statute if it did decide to entertain consideration of it. The three dissenting Justices recognized that the statute presented problems of interpretation. They said (375 Mich. 490, at 518, 134 N.W. 2d 637, at 649):

> "* * * The court will also consider and determine any issues with regard to the legality and construction of the act which may be raised, such as whether a minor is a 'person' within the meaning

> of the statute, the word 'person' being undefined and subject to construction in the light of a strong public policy favoring the protection of minors; * * *"

Surely, it would not be reasonable to hold that Petitioner was bound to anticipate that the Michigan Supreme Court would act in an unconstitutional manner by applying the statute and deciding a question of fact that was never before the trial court and concerning which the Petitioner had no opportunity to plead or offer evidence. The presumption that state courts and other public officers will act in a lawful manner was referred to recently by this Court in *Dombrowski v. Pfister,* 380 U.S. 479 (1965):

> "* * * It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court * * *" (380 U.S. 479, at 484)

Once the Michigan Court reached decision and by divided vote decided to entertain consideration of the statute and to apply the statute to this case without affording Petitioner an opporunity to plead or offer evidence with regard to it, Petitioner raised the federal questions in his petition for rehearing. The decision was reached May 10, 1965, and on May 28, 1965, Petitioner filed his petition for rehearing. As part of said petition for rehearing Petitioner offered new evidence in the form of affidavits which tends to take at least the case of David Heider outside the scope of the statute (Record, 339-346). In its opposition to rehearing before the Michigan Court and in its opposition to the petition for writ of certiorari in this Court Respondent made no contention that Petitioner had failed timely to raise the federal questions.

The order denying rehearing was entered October 4, 1965, over four months following the filing of the petition for rehearing. It is the practice of the Michigan Court not to issue an opinion upon denial of rehearing and none was issued here. While three Justices had dissented from the Court's decision, only two Justices dissented from the denial of rehearing. This indicates that the federal questions raised on petition for rehearing were indeed considered by the Michigan Court during the more than four months it was pending decision.

Petitioner submits that this case of *Heider* comes within the rule of *Saunders v. Shaw,* 244 U.S. 317 (1917); *Missouri v. Gehner,* 281 U.S. 313 (1930), and *Ohio v. Akron Park District,* 281 U.S. 74 (1930), which held in effect that when a constitutional privilege has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may timely challenge the unexpected ruling by a motion for rehearing.

In *Saunders v. Shaw,* the plaintiff sought an injunction against collection of a drainage tax. At trial he offered evidence to show that his land was not benefited by the drainage improvement but, upon defendant's objection, the evidence was excluded as inadmissible. However, the evidence was spread upon the record for purposes of appeal. Judgment was entered for the defendant and intervening defendant, a holder of bonds payable from the tax. The Supreme Court of Louisiana affirmed the judgment. Later, it granted rehearing upon the basis of a decision of the Supreme Court of the United States handed down after the first decision. The Louisiana Court observed that the evidence showed that plaintiff's land had not been benefited or drained and could not be drained under the present system, then reversed the judgment and granted an injunction. The intervening defendant then applied for rehearing which

the Louisiana Court declined to consider under its rule that only one rehearing should be granted. Then the intervening defendant for the first time raised the federal question in the assignment of errors filed with the Chief Justice of the Louisiana Supreme Court. The Supreme Court of the United States rejected the contention that the federal question was not timely raised. Quoting this Court (244 U.S. 317, at 320):

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. • • • It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the State by his assignment of errors. We do not see what more he could have done."

Petitioner Heider submits that failure to raise a statute in defense until the case is on appeal has the same effect as foreclosing one at trial from introducing evidence as to a proposition of fact there ruled immaterial. In each case, a party is deprived of an opportunity to introduce opposing evidence. Thus Petitioner as timely raised the fed-

eral questions in his petition for rehearing as counsel in *Saunders* did in the assignment of errors filed after denial of rehearing.

Missouri v. Gehner, 281 U.S. 313 (1930), involved interpretation of a Missouri statute imposing a tax upon all insurance companies organized under Missouri law. The Missouri Insurance Company made a return pursuant to the statute in which it declared the total value of its personal property to be $448,265, including $94,000 in United States bonds. The legal reserve and unpaid policy claims amounted to $333,486. It deducted such bonds, reserve, and claims, leaving $20,778 as the net value to be taxed. The board of equalization declined to accept the return, and held, after hearing, that the bonds of the United States were not taxable, that the statute contravened sections of the State Constitution, and that therefore, the company was not entitled to deduct the amount of such reserve and claims. The board assessed the company's taxable property at $50,000.

Upon the company's application, the Missouri Supreme Court issued its writ of certiorari. It found the statute valid, that the company's liabilities were chargeable against all its assets, taxable and nontaxable alike, declared that such reserve and claims should be apportioned between the two classes of assets according to their respective amounts, and determined that $90,710 was the net value to be taxed. The company moved for rehearing and urged that the statute violated Art. 1, Sec. 8 of the Constitution, which gives to Congress the power to borrow money on the credit of the United States, and also violated a section of the Revised Statutes, which provides that all United States bonds shall be exempt from taxation by or under state, municipal, or local authority. The Court denied the motion but modified its opinion and found $74,136 to be the taxable net

value. However, the Court made no reference to the federal questions raised. On appeal to the Supreme Court of the United States, the judgment was reversed.

Under the rationale of Respondent Michigan Sugar Company in this case, the Missouri Insurance Company should have invoked the federal claim prior to rehearing in protecting the United States bonds against taxation. But the Supreme Court held otherwise. Quoting the Court (281 U.S. 313, at 320):

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. * * * But here the company, at the first opportunity, invoked the protection of the federal Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States. The board of equalization completely eliminated the bonds from its calculations, and there is nothing in the language of the section to suggest that it authorizes any diminution of the amount of the deductible reserve and unpaid claims or an apportionment of such liabilities between taxable and nontaxable assets. *It may not reasonably be held that the company was bound* to anticipate such a construction or *in advance to invoke federal protection against the taxation of its United States bonds.* Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the State the federal question here presented and is entitled to have them considered. * * *" [Emphasis supplied.]

Similarly, in *Ohio v. Akron Park District*, 281 U.S. 74 (1930), this Court assumed that the federal questions were

raised at the earliest opportunity. These were two cases, each brought in the state court by a taxpayer attacking the Ohio Park District Act as being violative of both the State and Federal Constitutions. The validity of the act was sustained by the trial courts and by the intermediate state appellate court.

On appeal to the Ohio Supreme Court, two of the Justices held the statute was valid, while five Justices were of the contrary view. The State Constitution provided that "no law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void". The Ohio Supreme Court accordingly affirmed the judgments in favor of the defendants. Thereupon, motions to vacate the judgments and to enter judgments of reversal, grounded upon the assertion that said Ohio constitutional provision conflicted with the Federal Constitution, were made. The Ohio Supreme Court overruled the motions, and appeals were taken to the Supreme Court of the United States.

With respect to the timely raising of the federal questions, the appellants urged that it would have been speculative for them to raise the question in advance of the decision by the Ohio Supreme Court. This position is similar to that taken by Petitioner Heider in this case—that he should not be required to anticipate in advance of its decision that the Michigan Supreme Court would act in an unconstitutional manner. This Court, in *Akron Park District,* stated (281 U.S. 74, at 79):

> "The question with respect to the validity, from a Federal standpoint, of the provision of the state constitution that no law shall be held unconstitutional

> by the Supreme Court of the State without a concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional, was not raised in these suits until after the judgments of affirmance by the Supreme Court. But it is insisted that the point could not have been taken earlier, as in advance of the affirmance on a vote of the minority the question would have been speculative. Hence, it is said that the Federal question was raised at the earliest opportunity. (*Saunders v. Shaw*, 244 U.S. 317, 320.) Assuming that the Federal question is thus brought here, we find it to be without merit."

The Court then proceeded to reject the argument that the provision in question of the Ohio Constitution was in violation of the United States Constitution.

In light of the circumstances attendant here in *Heider*, the Petitioner respectfully submits that he timely raised the federal questions in his petition for rehearing, and that those questions are now properly before this Court for decision.

It appears incongruous to Petitioner that Respondent whose action in raising the statute at the eleventh hour gave rise to this appeal should now challenge as untimely the federal questions raised by Petitioner on rehearing.

II.

THE STATUTE DENIES THE EQUAL PROTECTION OF THE LAWS

Under the common law of Michigan, a trespassing adult can successfully assert a cause of action for damages for injuries sustained while on the land of another if he was injured through the gross negligence or wilful and wanton misconduct of the landowner. *Le Duc v. Detroit Edison Co.*, 254 Mich. 86, at 89, 235 N.W. 832, at 833 (1931). Trespassing minors were treated the same as trespassing adults, *Le Duc v. Detroit Edison Co., supra; Petrak v. Cooke Contracting Co.*, 329 Mich. 564, at 568, 46 N.W. 2d 574, at 576 (1951), despite liberal decisions elsewhere which took their impetus from the famous "turnable case", *Railroad Company v. Stout*, 84 U.S. (17 Wall.) 657 (1873), in which this Court affirmed a judgment awarding damages to a trespassing six year old boy. In the "turnable case" the Court recognized as well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. *Id.*, at 660.

As of 1959 at least 40 States distinguished between trespassing children and adult trespassers, either by adoption of the "attractive nuisance" doctrine or by following Section 339 of the Restatement of Torts, according to Dean William L. Prosser. 47 *Calif. L. Rev.* 427, 432-435 (1959).

A drastic change in the Michigan common law was worked by the decision of *Lyshak v. City of Detroit*, 351 Mich. 230, 88 N.W. 2d 596 (1958). *Lyshak* was later followed by the Michigan Supreme Court in *Swanson v. City of Marquette*, 357 Mich. 424, 98 N.W. 2d 574 (1959), and *Nielsen v. Henry H. Stevens, Inc.*, 359 Mich. 130, 101 N.W. 2d 284 (1960). By virtue of *Lyshak*, trespassing children who are injured through the ordinary negligence of a land-

owner who maintains a dangerous condition on his land may successfuly assert a cause of action if the landowner knows or should know that they trespass thereon.

The statute in question in this appeal, Act 201, worked no change in the common law rights of adults who are injured while trespassing on the land of another for the purpose of fishing, hunting or trapping without paying the landowner a valuable consideration therefor. By its provisions they still must establish gross negligence or wilful and wanton misconduct on the part of the landowner in order to recover. But as construed and applied in *Heider v. Michigan Sugar Co.*, 375 Mich. 490, 134 N.W. 2d 637 (1965), the statute worked a stern change in the common law rights of immature minors, of children of tender years who are injured while trespassing on the land of another for the purpose of fishing, hunting or trapping without paying the landowner a valuable consideration therefor. Under *Lyshak,* such a child injured while on the premises of a landowner such as Michigan Sugar Company, which maintains a dangerous condition on its land and which knows or should know that children trespass thereon, need establish only ordinary negligence. But under Act 201 as construed and applied, a child in the same circumstances must establish gross negligence or wilful and wanton misconduct on the part of the landowner.

The effect of the statute then is to discriminate invidiously between children. A non-paying, trespassing child who drowns because of a dangerous condition on the land while fishing through the ice is denied recovery upon proof of ordinary negligence. But a non-paying, trespassing child who drowns with him at the same pond as a result of the identical negligence of the landowner while skating on the ice is allowed recovery upon proof of ordinary negligence.

What, then, is the alleged reasonable basis asserted in justification of this discrimination? The Respondent suggests that it is because the hunter, trapper and fisherman are armed with "implements of destruction which may be hazardous to the owner or his livestock or fowl." (Brief of Respondent, p. 17.) The Petitioner agrees as to hunters, is skeptical as to trappers, and disagrees as to fishermen.

The Respondent suggests that the Michigan legislature could have thought that stronger deterrents were required because of their "depredations" against those who trespass on the land of others for the purpose of hunting, fishing or trapping than against other kinds of trespassers. Certainly the problem is a genuine one. Perhaps "stronger deterrents" are called for in the case of adult trespassing hunters, trappers and fishermen, but surely there is no reasonable basis for imposing these "stronger deterrents", viz. the invidious discrimination, upon mere children engaged in such activity. And we are talking about mere children here, not adults. This case concerns children of tender years—immature minors—specifically, a boy of eight years and his brother, twelve and a half years of age.

Such striplings are not hunters, trappers and fishermen in the sense that adults are. Rather, they are imitators of adults. They are play-actors who exist in a world of fancy and imagination. Justice Smith put it well when he said in *Lyshak:*

> "* * * We must weigh against the ancient exclusive rights of the landowner the known fact (among others) that although urban children live, physically, in a world in which the stream of traffic has replaced the stream of water, and concrete and asphalt the pasture and meadow, mentally theirs is still a world of fiction and fantasy. Theirs, we know also, is a world in which property rights,

> either personal or real, are obscure, and in which the trespass is the norm. These things we cannot change. They are existing facts, as concrete as the playground itself, and the law must take them into account. * * *" (*Lyshak v. City of Detroit,* 351 Mich. 230, at 242, 88 N.W. 2d 596, at 602.)

Such immature minors as these boys, such children of tender years, do not engage in hunting, trapping and fishing with anything approaching the intensity, frequency and effectiveness of their fathers, nor are their numbers anywhere near as great. Any "depredation" or waste they might happen to commit while so play-acting on the land of another would be minimal. Indeed, in this case one of Respondent's employees testified that Respondent "* * * would like to get rid of the muskrats because they do damage on the ponds * * *" 375 Mich. 490, at 511, 134 N.W. 2d 637, at 645-646.

To saddle these children with such a heavier burden of proof—just because of the nature of their activity—than must be borne by another child who is injured at the same time and place and as a result of the landowner's identical negligence while engaged in activity other than hunting, trapping or fishing, is to work an invidious discrimination and to deny them the equal protection of the laws.

III.

THE PROCEDURE FOLLOWED BY THE MICHIGAN SUPREME COURT DENIED PETITIONER DUE PROCESS OF LAW

Respondent misreads Petitioner's brief when it concludes that Petitioner attempts to create the impression that Respondent deliberately delayed raising the statute until this case reached the Michigan Supreme Court. Petitioner does not express this thought anywhere in his brief nor does he intend to imply it.

Respondent Michigan Sugar Company submits that the Michigan Court, with no contention before it that other facts existed which would bear on the applicability of the statute and without any motion by Petitioner for leave to amend the pleadings, could reasonably rely on the pleadings and record before it in determining whether the statute was to be applied. The short answer to this is that the Michigan Court did have before it on petition for rehearing the submission of Petitioner that facts did exist which would significantly affect the application of the statute to this case, and that the Court, except for two dissenting Justices, paid them no heed. These facts were set forth by affidavit. Further, since the State Supreme Court is an appellate, not a trial court it would have been futile for Petitioner to seek from it leave to amend his pleadings. In the first instance, if Respondent had properly pleaded the statute as a defense at the trial level, Petitioner could have exercised his right to amend his declarations if necessary. But when Respondent so belatedly raised the statute for the first time in its brief on appeal, it presented serious questions as to whether the Michigan Court would pay any attention at all to the statute and,

if so, how it would interpret it in the light of a strong public policy favoring the protection of minors. These crucial questions deservedly received Petitioner's first attention.

The record was replete with references to the fact that the boys were trapping, the Respondent argues. In support, it points to and in some instances quotes from the pleadings, the statements of Petitioner's counsel at pretrial proceedings and later at trial, the testimony of certain witnesses at the trial, and the findings of the trial judge. But this does not dismiss the evidence offered by affidavit on petition for rehearing—that David Heider, age 8, was physically incapable of trapping, owned no traps, and had never trapped (Record, 342-346), and that the testimony established that there were no eyewitnesses to the drownings (Record, 92), and that therefore there existed a question of fact under the statute as to why James Heider, age 12, was upon the Respondent's property at the time he drowned. Moreover three Justices of the Michigan Court concluded that the declarations do not disclose the applicability of the statute to bar Petitioner's causes of action, and that the record as made in the trial court fails to disclose any direct evidence that the boys in fact went upon Respondent's lands to fish, hunt, or trap. Thus, this case calls even more strongly for remand than did the facts in *Saunders v. Shaw,* 244 U.S. 317 (1917). There, the Louisiana Supreme Court first affirmed a judgment for defendant, holding that it was inadmissible for plaintiff to show that his land was not benefited by a drainage tax the collection of which he sought to enjoin. On rehearing, that Court reversed the judgment without affording defendant an opportunity to present his evidence concerning benefit and granted an injunction upon the basis of *Myles Salt Co. v. Board of Commissioners of the Iberia & St. Mary*

Drainage District, 239 U.S. 478 (1916), which was decided subsequent to its original decision. Defendant then petitioned the Louisiana Court for a second rehearing, but this was denied over the dissent of two Justices who voted to remand the case. In reversing the judgment this Court stated (244 U.S. 317, at 319):

> "* * * Probably the majority of the Supreme Court thought that it was so plain on the *uncontroverted facts* that the case was within the principle of *The Myles Salt Company's Case* that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." [Emphasis supplied.]

Saunders v. Shaw is discussed further in both Petitioner's first brief and in the brief of Respondent. Petitioner submits that Respondent's attempt to distinguish *Saunders* from this case on the basis of four "basic differences" falls short of the mark. *Firstly*, Respondent states that in *Saunders* the State Supreme Court decided a controverted factual issue without permitting a hearing while in this case there was no contested issue of fact before the Michigan Supreme Court which decided only a question of law. But the Michigan Court decided whether a cause of action had been stated in light of the statute—a question of law— only after resolving questions of fact which brought the statute into application. The questions of fact were determined by reference to the record made in the trial court before Respondent raised the statute on appeal, giving rise to the matter in dispute. Moreover, Petitioner's petition for rehearing in the Michigan Court raised contested issues of fact.

Secondly, Respondent argues that the State Supreme Court in *Saunders* made a finding of fact on an issue as to which the defendant had not been heard, while here Petitioner himself has admitted or established all the relevant facts. Petitioner denies the statement that the allegations of the pleadings and the testimony in the record establish that the boys were on the land to trap without having paid compensation therefor and that Respondent was not guilty of gross negligence or wilful and wanton misconduct. Petitioner submits that the pleadings and record of testimony are altogether silent on these points. Petitioner further submits that any relevant facts admitted or established by him were so admitted or established prior to the time that Respondent raised the statute, and that Petitioner's petition for rehearing put in issue certain relevant facts.

Thirdly, Respondent contends that in *Saunders* the defendant stated an adequate defense which was sustained by the trial court in accordance with the then prevailing law, while here Petitioner never set forth a cause of action because he failed to plead a case within the meaning of an applicable statute which he overlooked. This point represents a superficial attempt by the Respondent to mask its own omission to raise the statute—a matter of defense—in the trial court. Here, Petitioner timely filed these suits, tried them before a judge and jury, received substantial verdicts, and successfully opposed Respondent's motions for new trial. Only after Respondent belatedly raised the statute on appeal did the Michigan Supreme Court decide by divided vote, after examining the pleadings and record as made in the trial court, that no cause of action was stated.

Finally, Respondent states that unlike *Saunders* the decision by the Michigan Court is not based upon a decision of the United States Supreme Court handed down after the trial and after the State Supreme Court had originally spoken, but is based upon a statute enacted long before the trial and on an interpretation of that statute which could have been foreseen by anyone familiar with the statute. Suffice it to say that the statute had been in existence some seven years before the trial of these cases and had never been interpreted by the Michigan Supreme Court. Respondent's statement that the Michigan Court's interpretation of the statute could have been foreseen overlooks the opinion of three Justices of that Court who considered as uncertain whether a minor is a "person" within the meaning of the statute, the word "person" being undefined and subject to construction in the light of a strong public policy favoring the protection of minors.

The Petitioner respectfully submits that upon analysis these four "basic differences" are really not material differences at all and that *Saunders v. Shaw* is applicable because failure to raise a statute in defense until the case is on appeal has the same effect as foreclosing one at trial from introducing evidence as to a proposition of fact there ruled immaterial. In each case, the other party is deprived of an opportunity to introduce evidence in opposition.

The Petitioner submits that the procedure employed by the Michigan Supreme Court in these cases denied him due process of law.

Respectfully submitted,

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November 30, 1966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 48

HERBERT HEIDER, Administrator for the Estate of
JAMES D. HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent,
and
HERBERT HEIDER, Administrator for the Estate of
DAVID HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent.

PETITION FOR REHEARING

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Respondent.

PETITION FOR REHEARING

Now comes the Petitioner and moves for a rehearing:

That this Court granted a writ of certiorari in this cause. That at that time the respondent did not raise any objections as to the Federal questions being timely raised.

That your petitioner paid $2100.00 to print the record. He then, prepared a brief, a reply brief and argued said cause on December 8, 1966.

That on December 12, 1966 in a *Per Curiam* decision the writ was dismissed as improvidently granted.

Black's Law Dictionary defines "improvidently": "A judgment, decree, rule, injunction etc. when given or rendered without adequate consideration by the court, or without proper information as to all the circumstances affecting it, or based upon a mistaken assumption or misleading information or advice is sometimes said to have been 'improvidently' given or issued."

Your petitioner is perplexed as to what parts of Rule 58 govern this application for rehearing. However, with his application for certiorari, his briefs and argument, your petitioner somehow overlooked the deprivation of one of his fundamental constitutional rights under the 14th Amendment of the United States Constitution, to wit, the right to have a jury determine the factual issues, and now brings this point to the Court's attention to prevent a miscarriage of substantial justice.

The respondent belatedly invoked Michigan P.A. 201 of 1953 claiming that the minors, David Heider, age 8, and James Heider, age 12 were trapping on the respondent's property at the time of their unfortunate deaths.

The Michigan Supreme Court was hopelessly divided on this issue, three justices holding the pleading failed to state a cause of action, three justices holding just the opposite, stating the pleadings do *not* bar the petitioner's cause of action, and two justices who held that the proofs, the trial record, failed to exclude the application of P.A. 201 of 1953, and ordered entry of a judgment of no cause of action.

It is a fundamental rule of law that minors are wards of the courts and as such that pleadings, and even admissions of a parent, guardian or counsel cannot be binding against the minor. See *Burt v. McBain,* 29 Mich. 260; *Cooper v. Mayhew,* 40 Mich. 528; *Power v. Harlow,* 57 Mich. 107.

By not being confronted with P.A. 201 of 1953, in the trial court, the jury in David's case was not allowed to pass upon the fact issue, "was David, age 8, trapping?" was he physically capable of trapping, etc.

In James' case the trial judge, who was the trier of the facts, was never met with the statute so he made no determination of fact if James was trapping at the time of his death.

Why then, should the State Supreme Court, the appellate tribunal, who conducts no trials, but only reviews them, be allowed to substitute its judgment of what the facts are or should be? It is not the trier of the facts.

This clearly violates your petitioner's rights of due process under the 14th Amendment of the United States Constitution to have questions of fact determined in the trial court.

Your petitioner timely raised the Federal questions under the 14th Amendment of the United States Constitution as more particularly set forth in his reply brief (pages 1-10) to that issue as raised by the respondent's brief. Suffice it to say the act complained of is the action of the State Supreme Court itself.

The case of *Saunders v. Shaw,* 244 U.S. 317 (1917) is clearly in point, namely that it is a violation of due process for a State Supreme Court to reverse a case and render judgment absolute against the petitioner, the successful party in the trial court, upon a proposition of fact not determined in the trial court, and further that such an action

by a State Supreme Court need not be anticipated and therefore it is proper to raise the Federal questions thereafter, as your petitioner did in his petition for rehearing in the State Court.

Wherefore, it is respectfully prayed that this Court grant a rehearing or order the causes remanded to the trial court for new trials upon the issues raised by Michigan P.A. 201 of 1953.

Respectfully submitted,

GREGORY M. PILLON,
Attorney for Petitioner,
821 Bates Street,
Detroit, Michigan 48226.

CERTIFICATE OF COUNSEL

I, Gregory M. Pillon, attorney for petitioner named herein do certify that this petition for rehearing is not presented for purposes of delay but is presented in good faith to prevent a miscarriage of justice to the petitioner.

.....

GREGORY M. PILLON,
Attorney for Petitioner.

Dated: January 5, 1967.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

HEIDER, ADMINISTRATOR ETC. *v.* MICHIGAN SUGAR CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 48. Decided December 12, 1966.

PER CURIAM.

The writ is dismissed as improvidently granted.